

**Report by the Local Government and Social Care  
Ombudsman**

**Investigation into a complaint about  
North Yorkshire County Council  
(reference number: 21 005 558)**

**12 September 2022**

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## The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

### Key to names used

Mrs X      The complainant  
Y          Her son

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## Report summary

### Education & Children Services

Mrs X complained North Yorkshire County Council (the Council) took too long to issue her son Y's Education, Health and Care plan (EHC plan). She also complained communication with officers in the Special Educational Needs (SEN) Team was poor and the Educational Psychologist (EP) did not see Y before completing her report.

### Finding

Fault causing injustice and recommendations made.

### Recommendations

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

To remedy the injustice caused, the Council should:

- apologise to Mrs X for the fault identified in this report and the avoidable distress and time and trouble complaining;
- pay Mrs X £250 to reflect her injustice (delay in receiving rights of appeal, avoidable distress and time and trouble chasing up officers);
- pay Y £450 to reflect a loss of special educational provision caused by the Council's delay; and
- review other cases similarly affected by delay who also complained to the Council but who may not have received an appropriate remedy for a loss of specialist education.

The Council has accepted our recommendations.

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## The complaint

1. Mrs X complained North Yorkshire County Council (the Council) took too long to issue her son Y's Education, Health and Care plan (EHC plan). She also complained communication with officers in the Special Educational Needs (SEN) Team was poor and the Educational Psychologist (EP) did not see Y before completing her report.
2. Mrs X also complained about the description of Y's SEN and the SEN provision on his EHC plan.
3. Mrs X said this caused avoidable distress, time and trouble. She also said the delay in issuing the final EHC plan meant Y missed out on SEN provision.

## What we investigated

4. We investigated complaints in paragraph one. The reason for not investigating complaints in paragraph two is at the end of this report.

## Legal and administrative background

### The Ombudsman's role and powers

5. We investigate complaints about 'maladministration' and 'service failure'. In this report, we 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. We must also consider whether any fault has had an adverse impact on the person making the complaint. We 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. This complaint involves events that occurred during the COVID-19 pandemic. The Government introduced a range of new and frequently updated rules and guidance during this time. We can consider whether the Council followed the relevant legislation, guidance and our published "[Good Administrative Practice during the response to COVID-19](#)". We expect councils to explain reasons for any delay and keep people updated on progress.
7. 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*)
8. The Special Educational Needs and Disability Tribunal hears appeals about the content of EHC plans including the description of a child's SEN and the SEN provision in an EHC plan.
9. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*) We used this power because the Council upheld Mrs X's complaint and said a shortage of EPs was a reason for the delay. So it appeared likely to us there were

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other parents and children who may have suffered injustice for the same reason. We asked the Council about others who complained about the same issue and for the complaint responses on those cases.

10. 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 a copy of the final report with Ofsted.

### **Relevant law and guidance**

11. Children with special educational needs may have an Education, Health and Care (EHC) plan. Councils are the lead agency for carrying out assessments for EHC plans and have the statutory duty to secure special educational provision in an EHC plan. (*Children and Families Act 2014, Section 42*)
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 Code is based on the Children and Families Act 2014 and the SEND 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; and
  - 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 EHC assessment councils must gather advice from relevant professionals (*SEND 2014 Regulations, Regulation 6(1)*). This includes:
  - the child's education placement;
  - medical advice and information from health care professionals involved with the child; and
  - psychological advice and information from an Educational Psychologist (EP).Those consulted have six weeks to provide the advice.
14. When a council sends a draft plan to a child's parent or young person it must give them at least 15 days, beginning with the day on which the draft plan was served, in which to make representations about the content of the draft plan, and to ask that a particular school or other institution be named in the plan (*SEND Regulations, Regulation 13(1)*)
15. The Council told us since the pandemic, it was standard practice for EPs to complete assessments through video appointments unless a face-to-face meeting was necessary (such as when a child or young person cannot engage with a video call). The Council said video calls were appropriate in many cases as children and young people were comfortable with them due to on-line schooling during lockdowns.

### **How we considered this complaint**

16. We produced this report after examining relevant documents, speaking to Mrs X and interviewing a senior officer in the Council responsible for SEN services.
17. We gave Mrs X and the Council a confidential draft of this report and asked for their comments. We took comments into account before finalising the report.

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## What happened

### Background: Delays in Educational Psychology assessments in North Yorkshire

18. In 2020, the Council upheld 26 complaints about delays in EP assessments which in turned delayed completion of EHC assessments and decisions about issuing an EHC plan. It upheld all 26 complaints, apologised and offered most complainants a symbolic payment of £150 for their time and trouble and to reflect a breach of the statutory timescales for completion of the EHC assessment and plan process. In no case did the Council offer a payment for loss of special education provision.
19. The Council told us the delays were because of a shortage of permanent, council-employed EPs because staff had retired or moved on to different roles. It said it had advertised for vacancies four times but there had not been a great response. Despite offering higher salaries, it had failed to recruit to all the vacant posts, so had been using agency staff to complete statutory assessments. The Council stressed there was a national shortage of EPs with 70% of councils reporting similar problems. It said SEN case officers were prioritising cases where EP assessments had been delayed so they reached the panel and a decision was made quickly about whether to issue an EHC plan.
20. The Council went on to explain how it had been trying to reduce the backlog of cases waiting for an EP assessment and improve adherence to the timescales in the Code.
  - It met with the agencies regularly to discuss progress on reducing the backlog.
  - It recruited extra SEN casework officers and administrators to ensure there were no further bottlenecks in processing EHC plans.
  - It was sharing updates on performance with relevant agencies including the parent carer forum.
  - It was advertising for EPs again (in February 2022).

### Y's case

21. Y attends a mainstream primary school. He has SEN arising from dyslexia and social, emotional and mental health issues. Mrs X asked the Council for an EHC assessment for Y at the start of November 2020.
22. On 17 December, an SEN casework officer wrote to Mrs X, acknowledging her request for an EHC assessment and offering a meeting on 13 January 2021. The letter explained the Council would decide whether to complete an EHC assessment after the meeting. An SEN casework officer wrote to Mrs X on 19 January saying the Council had decided to carry out an EHC needs assessment.
23. An SEN casework officer and Mrs X spoke and emailed in February. The casework officer explained there was a shortage of EPs and suggested Y could have an assessment by a specialist teacher instead of an EP. This suggestion did not proceed as the casework officer later said it was not appropriate in Y's case.
24. Mrs X sent many emails to officers and managers in the SEN team between February and June 2021 chasing up progress and pointing out the timescales in the Code. Sometimes she received 'out of office' replies and other times, a manager acknowledged and apologised for the delay in allocating an EP.

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25. In May, Mrs X complained. The Council replied in June upholding her complaint saying it was due to the pandemic and staff shortages. The Council acknowledged it had breached the timescales in the Code and offered Mrs X £150 to reflect her time and trouble. Mrs X tried to escalate her complaint with the Council, but it refused saying it had upheld her complaint and could not add anything further.
  26. At the start of June, Mrs X chased the SEN manager again saying she had not heard anything from the EP service since an email at the end of April saying Y was 'at the top of the list.' Mrs X said Y's mental health was declining and he was often vomiting before school.
  27. An EP produced a report on 11 June. The EP did not meet Y in person or virtually. The EP gathered information about Y from a teacher and from speaking to Mrs X by phone.
  28. The Council issued a draft EHC plan on 15 June 2021.
  29. Mrs X responded a week later with some comments about the professionals' reports. She asked for an extension to the 15-day timeframe to respond to the draft EHC plan. The case records and information from Mrs X indicate the casework officer agreed to an extension, but she did not specify a date.
  30. A manager sent Y's final EHC plan to Mrs X on 7 July while the casework officer was still on annual leave and without knowing of the extension the case worker had agreed with Mrs X. Mrs X told us she phoned the SEN team and another casework officer told her the final plan would revert to a draft plan because of the mix-up.
  31. On 16 July, Mrs X emailed the Council with her suggested amendments to the plan. She said she wanted amendments to the description of Y's SEN and the provision.
  32. Mrs X complained to us at the end of July having heard nothing further from the SEN team about finalising Y's EHC plan.
  33. The Council issued Y's final amended EHC plan on 18 August, naming Y's current school in line with Mrs X's preference.
  34. Since the complaint to us, Y has had a face-to-face EP assessment and an early annual review of his EHC plan.
  35. The Council told us:
    - it had spoken to Y's school which confirmed it took the necessary steps to ensure Y received the SEN provision on the EHC plan throughout the EHC assessment and draft plan process;
    - the headteacher did not consider there was any detriment to Y's education and it would backdate funding to reimburse the school for the additional provision it had made; and
    - it was willing to offer a pro rata payment for loss of provision in line with the national high needs funding formula. This is top-up funding given to schools which reflects the SEN provision specified in EHC plans and is £1,400 a year for Y.

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## Conclusions

36. Generally, we expect councils to follow the timescales set out in the Code which is statutory guidance. We measure a council's performance against the Code and we are likely to find fault where there are significant breaches of timescales.
37. Mrs X asked for an EHC assessment at the start of November 2020. The Council decided to carry out an assessment and issued a decision letter in the middle of January 2021, so it took about 10 weeks. This was a delay of four weeks and was fault as the Code allows councils six weeks from the date of a parental request.
38. The Code says EP reports should be completed within six weeks of a request. We have assumed the SEN team requested EP advice in the middle of January (at the same time as it decided to assess Y). This means the EP's report should have been available by the start of March to comply with the six-week timeframe. The EP's report was not completed until the middle of June – a delay of three and a half months. The delay was not in line with the Code and was fault.
39. The Council also failed to complete the process and issue a final EHC plan within 20 weeks from the date of Mrs X's request at the start of November 2020. It should have issued Y's final plan around the end of March or beginning of April 2021. The final EHC plan was not available until July 2021. Even taking into account the possibility that Mrs X may have asked for an extension of a couple of weeks to comment on the draft plan, this was still a delay of between three and four months which was fault. It had an adverse impact on Mrs X because it delayed her right of appeal to the SEND Tribunal and caused avoidable distress and time and trouble chasing officers up. It also meant there was a loss of SEN provision for Y because he could have received the tailored provision on an EHC plan yet to be finalised.
40. The records suggest Mrs X was chasing officers in the SEN team many times for updates, that she did not always get substantive replies and any replies did not give meaningful updates. Our view is the Council should have given Mrs X a rough timescale for when Y's case would reach the top of the EP's waiting list and an estimated date for the draft EHC plan, if appropriate. The failure to give a rough timeframe was poor communication and was fault. We have taken into account this period was during COVID-19, but we still expect councils to keep in touch with people, especially when they are dealing with issues affecting a child's education.
41. There is no requirement in the Code for EP assessments to be in-person, so we do not uphold this part of Mrs X's complaint.

## Recommendations

42. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)
43. To remedy the injustice caused, the Council should:
  - apologise to Mrs X for the fault identified in this report and the avoidable distress and time and trouble complaining;
  - pay Mrs X £250 to reflect her injustice (delay in receiving rights of appeal, avoidable distress and time and trouble chasing up officers);



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- pay Y £450 to reflect the loss of three months of SEN provision caused by the Council's delay as set out above. This is in line with the low range of the guideline in our [Guidance on Remedies](#) which recommends between £150 and £600 a month for loss of SEN provision. This recommendation takes into account the personalised teaching assistant support set out in Y's EHC plan, that the primary school placement remained the same and that schools reopened at the start of March 2021 after lockdown closure. We note the Council and school's view that Y suffered no loss of provision. But the support provided before the EHC plan was issued is likely to have been general. It could not have covered the detailed, personalised support outlined in the EHC plan, drawn up following specialist assessments, as the plan had not been issued. So we do not share the Council's view that Y suffered no injustice because of the delay. £450 is also broadly in line with the high needs funding formula the Council has suggested (see paragraph 35).
44. We acknowledge the real difficulties the Council faces with recruitment and retention of EPs and we note the Council has already taken appropriate steps to reduce the backlog of EP assessments. We note also the problem is a national one. The purpose of this report is to highlight the difficulties many councils are facing with EP recruitment. The Council should send us copies of the next two quarterly progress reports it shares with partner organisations.
  45. The Council needs to review the 26 complaints it upheld about delays in the EHC assessment process, taking into account our findings of fault in Y's case and our published [Guidance on Remedies](#) to see if higher payments for time and trouble and/or payments to reflect a loss of SEN provision are warranted. We will require a brief anonymised summary of each case, setting out key facts, findings and details of any payments the Council decides are appropriate.
  46. We are pleased the Council has accepted all the recommendations in paragraphs 43 to 45 and has started the review of other upheld complaints.

### **Final decision**

47. There was a delay in completing Y's Education, Health and Care assessment and plan which caused avoidable distress, time and trouble and a loss of education provision. The Council needs to apologise, make payments and review other upheld complaints about the same issue to see if there is further injustice requiring a remedy.

### **Parts of the complaint we did not investigate**

48. We did not investigate the complaint about the description of Y's SEN or the SEN provision on his EHC plan because it was reasonable for Mrs X to appeal to the SEND Tribunal.