

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

**Investigation into a complaint about
Oxfordshire County Council
(reference number: 21 009 723)**

05 December 2022

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

Miss X	The complainant
Y	Her son

Report summary

Education – special educational needs

Miss X complained that the Council:

- failed to make alternative provision for her son, Y, when he was unable to attend school due to anxiety caused by the school not meeting his needs;
- delayed in completing an education, health and care plan needs assessment; and
- delayed in dealing with her complaints about the Council's failure to make alternative provision and delay in completing the needs assessment.

Finding

Fault found 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*)

In addition to the requirements set out above, the Council should:

- send a written apology to Miss X for the distress caused to her and Y by not making suitable alternative provision for him and for the delay in issuing a final education, health and care plan;
- pay Miss X £1,600 on behalf of Y to acknowledge he did not receive full-time suitable education between June 2021 and February 2022;
- pay Miss X £2,400 on behalf of Y to acknowledge he has not received any educational provision between February and 26 June 2022;
- pay Miss X £1,000 to acknowledge the distress, avoidable time and trouble and impact on her ability to work caused by the Council's failure to provide suitable alternative provision to Y;
- pay Miss X £2,200 to reimburse the cost of the educational psychologist assessment which she commissioned;
- by training or other means, ensure officers are aware of the Council's duty under section 19 of the Education Act 1996 to provide suitable education to children unable to attend school and the factors they should consider when deciding whether alternative provision should be made; and
- ensure it has procedures for tracking pupils who require alternative provision, including for absences other than for medical reasons, to ensure that provision is regularly reviewed to meet their education and special educational needs.

The complaint

1. Miss X complained that the Council:
 - failed to make alternative provision for her son, Y, when he was unable to attend school due to anxiety caused by the school not meeting his needs;
 - delayed in completing an education, health and care plan needs assessment; and
 - delayed in dealing with her complaints about the Council's failure to make alternative provision and delay in completing the needs assessment.
2. Miss X considers the Council's failure to make alternative provision and the delay in completing the needs assessment has caused her son to miss a significant amount of education and caused him distress. It has also caused distress and avoidable time and trouble to Miss X.

Legal and administrative background

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we 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. 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*)
4. 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.

Providing alternative education

5. Section 19 of the Education Act 1996 (the Act) says each local authority will make arrangements for the provision of suitable education at school, or otherwise than at school, for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them. The Act goes on to say suitable education means efficient education suitable to a child's age, ability and aptitude and to any special educational needs (SEN) he or she may have.
6. Government guidance makes clear that where a council knows a child is not receiving suitable full-time education, or not receiving the number of hours they could benefit from education, it should step in to arrange provision.
7. We issued guidance '[Out of school, out of sight](#)' to councils on how we expect them to fulfil their responsibilities to provide education for children who, for whatever reason, do not attend school full-time.
8. Councils should:
 - consider the individual circumstances of each case and be aware that a council may need to act whatever the reason for absence (except for minor issues that schools deal with on a day-to-day basis) – even when a child is on a school roll;
 - choose, based on all the evidence, whether to enforce attendance or provide the child with suitable alternative education;

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- keep all cases of part-time education under review with a view to increasing it if a child's capacity to learn increases;
 - adopt a strategic and planned approach to reintegrating children into mainstream education where they are able to do so; and
 - put whatever action is chosen into practice without delay to ensure the child is back in education as soon as possible.
9. Statutory guidance '*Ensuring a good education for children who cannot attend school because of health needs*' states the law does not define full-time education but children with health needs should have provision which is equivalent to the education they would receive in school. Councils should also review the provision offered regularly to ensure that it continues to be appropriate for the child and that it is providing suitable education.

Education, Health and Care plans

10. Statutory guidance '*Special educational needs and disability Code of Practice: 0 to 25 years*' ('the Code') sets out the process for carrying out Education, Health and Care (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 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.

How we considered this complaint

11. We produced this report after examining relevant documents and discussing the issues with the complainant.
12. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

13. The following is a summary of key events. It does not include everything that happened.
14. Miss X's son, Y, has a diagnosis of autism spectrum disorder (ASD) and attended a primary school. In early 2021 Y moved to a reduced timetable as he was experiencing significant anxiety when attending school. Miss X applied for Y to be assessed for an EHC plan which the Council refused. Miss X appealed against this decision.

Alternative provision

15. In June 2021 Y stopped attending school due to his anxiety. Miss X and her independent social worker had a meeting with the school and an attendance officer in early July 2021. A SEN officer did not attend. There are no records of the meeting but an email sent by the Council records Miss X submitted a private Speech and Language Therapy assessment and the school requesting advice

from the SEN service. The email also notes Miss X's independent social worker considered the school could not meet Y's needs. The Council's email notes the school was providing online learning for Y.

16. In February 2022 the headteacher of Y's primary school sent an email to the Council. The headteacher said Y was not accessing the online provision and the school could not meet Y's needs. She said Y needed alternative provision as soon as possible. The school reiterated that it could not meet Y's needs when questioned about Y's attendance in March 2022. Y is still out of school.

EHC plan

17. In early August 2021 the Council agreed to carry out a needs assessment for Y. In April 2022, the Council's multi agency panel (MAP) considered Y's needs assessment and agreed to issue a EHC plan. The minutes of the meeting note Y had been out of school since June 2021 and the school had not explored an alternative package of education for Y.
18. The Council issued a draft EHC plan for Y in late April 2022 and the final plan in late June 2022.

Complaint

19. Miss X complained to the Council that it failed to make alternative education provision for Y. A senior officer responded to the complaint and advised that if Miss X could provide medical evidence to show Y could not attend school then it would work with his primary school to provide alternative provision for him. Miss X requested her complaint be escalated for a further review in line with the Council's complaints procedure.
20. In September 2021 Miss X complained to the Council about delays in the needs assessment process as an educational psychologist had not contacted her about Y's assessment. The Council responded in October 2021 and upheld Miss X's complaint. It said the Council was sourcing private assessments but there was limited availability and a considerable delay. Miss X requested her complaint be escalated for further review. She also suggested her private educational psychologist could carry out Y's assessment.
21. The Council responded to Miss X's complaints about the lack of alternative provision and delay in carrying out the needs assessment in mid December 2021. The Council did not uphold Miss X's complaint about not providing alternative provision as it said Y's needs could be met at school. The Council upheld Miss X's complaint about the delay in carrying out Y's needs assessment.
22. The Council said the delay in completing Y's needs assessment and issuing a draft EHC plan was caused by a national shortage of educational psychologists. It tried to deal with the shortage by commissioning assessments privately. The Council also said the delay in deciding if Y needed an EHC plan was caused by a lack of capacity in the SEN team. It reminded officers that such delays should not occur.
23. Miss X provided a referral from a clinical psychologist to Child and Adolescent Mental Health Services (CAMHS). The referral said Y suffered low mood because of not being offered alternative education provision. Miss X said the failure to provide alternative provision caused significant distress to her and she has been unable to work as Y is at home. Miss X said she incurred costs because of the Council's failure to meet the statutory timescales for EHC plans as she had to commission her own educational psychology report.

Conclusions

Jurisdiction

24. Miss X has appealed to the SEND Tribunal about the content of the EHC plan issued in late June 2022. This means we do not have jurisdiction to investigate matters from when the appeal right became available. Miss X is appealing the named placement so the provision of education to Y after this date is inextricably linked to Miss X's appeal.

Alternative provision

25. The Council is at fault as it failed to comply with its duty under section 19 of the Education Act 1996 to ensure Y received suitable education.
26. The Council considers the school was providing suitable alternative provision for Y between June 2021 and February 2022. Evidence provided by both the Council and Miss X shows the school offered online provision without any direct teaching. The statutory guidance '*Ensuring a good education for children who cannot attend school due to health needs*' provides the alternative provision on offer should be on a par with what is offered in school. So, the provision offered to Y was not suitable due to the lack of any direct teaching. The provision was also not based on any assessment of Y's specific needs.
27. There is no evidence to show the Council checked what education was on offer to Y. There is no evidence to show the Council reviewed whether the school could meet Y's needs and whether the online education provision was suitable when Y remained out of school. It is inexplicable that the Council failed to provide alternative provision when the school notified it in February and March 2022 that it could not meet Y's needs and he was not accessing the online provision. The minutes of the MAP meeting of April 2022 show officers do not understand that the duty to provide suitable education lays with the Council. Consequently, the Council failed to provide suitable alternative provision between June 2021 and June 2022. This is fault.
28. The school suggested a tutor for one hour a week in December 2021. Miss X has said the school could only offer a tutor for six to eight weeks and this would have been detrimental to Y's mental health when removed. We note Miss X's reluctance to accept a tutor for a limited period but no direct teaching was put in place so the provision made between June 2021 and June 2022 was unsuitable.
29. The Council's response to Miss X's stage one complaint asked her to provide medical evidence to show why Y could not attend school. This is fault. Our guidance makes clear it is still necessary for a council to make alternative provision where a child is not able to attend school for any valid reasons, not just medical needs.

EHC plan

30. The Council should have issued Y's final EHC plan within 20 weeks of when it agreed to carry out the needs assessment. So, Y's final EHC plan should have been issued by 24 December 2021. The Council issued the final EHC plan in June which is a delay of six months. This is fault.
31. The delays were caused by a shortage of educational psychologists which delayed Y's needs assessment. It was also caused by a lack of capacity in the SEN team. We acknowledge the delays caused by the shortage of educational psychologists was beyond the Council's control. But the Council's failure to issue Y's EHC plan within the statutory timescales is service failure and fault even

though it was caused by external factors. Furthermore, the Council could have considered commissioning a private educational psychologist report sooner than October 2021 to ensure it met the statutory timescales.

Complaint handling

32. The Council's complaint handling was poor. The Council should have responded to Miss X's requests for further review within 20 working days. The Council took four months to respond to Miss X's request for a further review of her complaint about the Council not providing alternative provision. It took two months to respond to Miss X's request for a further review of her complaint about the delay in the EHC needs assessment. This is fault. The Council also failed to carry out a proper investigation into Y's education provision when responding to Miss X's complaint and establish it had a duty to provide suitable education to him.
33. The Council failed to keep Miss X informed of the progress of Y's educational psychologist assessment. The Council told Miss X that Y would be referred to a private educational psychologist. But it did not give her a timescale and said there were considerable delays. So Miss X could not know when Y would be assessed for his EHC plan and how much longer the assessment would be delayed.

Injustice

34. The Council should have issued the final EHC plan by 24 December 2021. The delays in carrying out Y's EHC needs assessment and issuing the final EHC plan delayed the identification of Y's needs and provision he required. It also delayed the identification of an alternative placement. It delayed Miss X's right of appeal if she was unhappy with the content of the EHC plan or named school. In turn the delays meant Y has been out of school and not received suitable education for longer than necessary.
35. As explained above, the online provision made by the school was not suitable. We therefore consider the Council's failure to consider alternative provision for Y meant he did not receive suitable education from June 2021 to June 2022.
36. There is evidence the delays in the EHC plan process and failure to make alternative provision for Y has caused him significant distress. The failure has also caused significant distress and avoidable time and trouble to Miss X. The delays in responding to Miss X's complaints also meant she had to chase the Council for a response and was not kept up to date with the progress of Y's needs assessment.
37. We consider the fault by the Council has caused Y to miss education since June 2021. The Council should make a payment of £200 a month between June 2021 to February 2022 (excluding the summer holiday). This payment is to reflect the school provided some online learning to Y but he did not receive suitable full-time education. The Council should make a payment of £600 a month from March 2022 to 26 June 2022 to acknowledge Y did not receive any education during this time.
38. Miss X said the delays in the EHC plan process caused her to commission her own educational psychologist report at a cost of £2,200. We do not normally recommend reimbursement of the costs of privately commissioned reports. However, we consider the Council's delay in dealing with Miss X's complaint and failure to keep her informed of the progress of the needs assessment caused her to commission the educational psychologist's report. As the report was commissioned by Miss X directly as a result of fault, the Council should reimburse Miss X for the cost of the report.

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39. The Council has provided evidence to show it is taking action to improve its compliance with the statutory timescale of 20 weeks for issuing final EHC plans. We therefore do not consider it necessary to make recommendations for service improvements.

Recommended action

40. 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*)
41. In addition to the requirements set out above, the Council should:
- send a written apology to Miss X for the distress caused to her and Y for failing to make suitable alternative provision for him and for the delay in issuing the final EHC plan;
 - pay Miss X £1,600 on behalf of Y to acknowledge he did not receive full-time suitable education between June 2021 and February 2022;
 - pay Miss X £2,400 on behalf of Y to acknowledge he has not received any educational provision between February and 26 June 2022;
 - pay Miss X £1,000 to acknowledge the distress, avoidable time and trouble and impact on her ability to work caused by the Council's failure to provide suitable alternative provision to Y;
 - pay Miss X £2,200 to reimburse the cost of the educational psychologist assessment which she commissioned;
 - by training or other means, ensure officers are aware of the Council's duty under section 19 of the Education Act 1996 to provide suitable education to children unable to attend school and the factors they should consider when deciding whether alternative provision should be made; and
 - ensure the Council has procedures for tracking pupils who require alternative provision, including for absences other than for medical reasons, to ensure that provision is regularly reviewed to meet their education and special educational needs.

Decision

42. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Miss X and Y. The Council should take the action identified at paragraph 41 to remedy that injustice.

Parts of the complaint we did not investigate

43. During our investigation Miss X raised concerns about the quality of the assessments carried out for Y's EHC needs assessment. These matters go to the content of Y's EHC plan and Miss X has appealed to the SEND Tribunal so we do not have discretion to investigate them.