

Report by the Local Government and Social Care Ombudsman

**Investigation into a complaint about
Surrey County Council
(reference number: 23 000 875)**

8 January 2024

The Ombudsman's role

For almost 50 years we have independently and impartially investigated complaints about councils and other organisations in our jurisdiction. If we decide to investigate, we look at whether organisations have made decisions the right way. Where we find fault has caused injustice, we can recommend actions to put things right, which are proportionate, appropriate and reasonable based on all the facts of the complaint. We can also identify service improvements so similar problems don't happen again. Our service is free.

We cannot force organisations to follow our recommendations, but they almost always do. Some of the things we might ask an organisation to do are:

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

We publish public interest reports to raise awareness of significant issues, encourage scrutiny of local services and hold organisations to account.

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 J	The complainant
K	Her daughter

Report summary

Education/SEN assessments and reviews

The Council has delayed its education, health and care (EHC) needs assessment for Mrs J's daughter, K. This has been mainly due to a delay in obtaining advice from its educational psychologist. The Council's communications have been poor.

Mrs J says the impact on K is that she has not been able to access education. The whole family has had counselling, as a direct result of the delay. K is at the end of her Key Stage. And, due to the delay, K attended taster days at mainstream schools, despite the schools saying a placement would not work for her.

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)

The Council should, within three months of the date of this report, start to:

- prepare quarterly reports to its relevant committee, to ensure democratic oversight of its Recovery Plan; and
- publish updates on its website, so those affected by delays can track progress.

To remedy the personal injustice, the Council should, within one month of the date of this report:

- apologise to Mrs J for the avoidable distress, frustration, and time and trouble caused by the delay. We have published [guidance on remedies](#) which sets out our expectations for how organisations should apologise effectively to remedy injustice. The Council should consider this guidance in making the apology; and
- pay Mrs J a symbolic payment of £1,000 for the distress to her for the delay in issuing K's EHC Plan.

The Council has agreed the recommendations and should provide us with evidence it has complied with them.

The complaint

1. The Council has delayed its education, health and care (EHC) needs assessment for Mrs J's daughter, K. This has been mainly due to a delay in obtaining advice from its educational psychologist. It has also not prioritised K's application, despite her being in a change of Key Stage year.
2. In response to complaints, the Council agreed to give Mrs J a contact officer who would keep in touch with her. But that did not happen.
3. Mrs J says the impact on K is that she has not been able to access education. The whole family has had counselling, as a direct result of the delay. K was at the end of her Key Stage. And, due to the delay, K attended taster days at mainstream schools, despite the schools saying a placement would not work for her.

Legal and administrative background

The Ombudsman's role and powers

4. We investigate complaints of injustice caused by '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. (Local Government Act 1974, sections 26(1), as amended)
5. 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. The law says we cannot normally investigate:
 - most complaints about what happens in schools. (Local Government Act 1974, Schedule 5, paragraph 5(2), as amended)
 - 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)
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 report.
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.

Relevant law and guidance

9. Children with special educational needs may have an EHC Plan. The EHC Plan is set out in sections. We cannot direct changes to the sections about the type and amount of educational provision or to name a different school. Only the SEND Tribunal can do this.

10. Councils are the lead agency for carrying out assessments for EHC Plans and have the non-delegable statutory duty to secure special educational provision in an EHC Plan. (Children and Families Act 2014, Section 42)
11. Statutory guidance 'Special Educational Needs and Disability Code of Practice: 0 to 25 years' ('the Code') sets out the process for carrying out EHC needs 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.
12. 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. The Code says the psychologist should normally be employed or commissioned by the local authority.
13. Those consulted have six weeks to provide the advice.
14. Once the required EHC needs assessment reports are in, if the council goes on to:
 - refuse to issue an EHC Plan, the law says it must complete the process within 16 weeks from the date it received the initial request for an assessment;
 - agree to issue an EHC Plan, the law says it must complete the process by 20 weeks from the date it received the initial request for an assessment.
15. When a council sends a draft EHC 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. It must then consult with schools and allow them 15 days to respond. (SEND Regulations, Regulation 13(1))
16. At the stage when a council refuses to issue an EHC Plan, or when it issues a final EHC Plan, parents have a right to appeal to the SEND Tribunal if they disagree with the council's decision, or the content of the plan. They have two months to lodge an appeal.

How we considered this complaint

17. We produced this report after examining relevant documents and speaking to Mrs J. We also considered our guidance on remedies.
18. We gave the complainant and the Council a confidential draft of this report and invited their comments. We took the comments into account before finalising the report.

19. We are issuing this report to highlight the difficulties faced by Surrey, which are similar to those experienced by several other councils in England. There is a reported national shortage of educational psychologists and an increase in demand for EHC needs assessments. We have provided details of K's case in this report to illustrate those affected by this and the approach we are taking regarding service failure and our recommendations for the injustice caused and any service improvements we might make. Nevertheless, it is important to note that we have investigated many other similar complaints across several councils. [Government statistics](#) show that for the 2023 reporting period, only 49.2% of EHC Plans in England were issued within the statutory 20 week deadline.

What we found

Background: Delays in educational psychology assessments in Surrey

20. The Council told us it has a backlog of around 1,000 EHC needs assessments awaiting an educational psychologist assessment. It explained how its Educational Psychology Service had seen a 64% increase in referrals (since 2020) for Education, Health and Care Plans. It noted a national shortage of qualified educational psychologists and other key professionals who provide advice as part of the needs assessment process. The core Educational Psychology Service staffing was at 50%. As a result, there had been high demand for assessments but a reduced capacity in the teams that undertake assessment work.
21. We have seen an increase in complaints about this Council's (and several other councils') delays in its educational psychologists' assessments for EHC needs assessments. In the year before May 2023, the Council says it upheld all 124 of the complaints it received about delayed educational psychologist assessments, which in turn delayed completion of EHC assessments.
22. The Council explained how its Service had taken several actions to address the delays and improve adherence to the statutory timescales. These included:
- prioritising statutory assessment work over other work;
 - advertising both locally and nationally to fill positions;
 - extending the use of locum and associate educational psychologists;
 - commissioning an external provider to support this work;
 - from May 2023 (for a limited period), allowing, subject to certain criteria, submission of independent educational psychologist assessments (commissioned by parents) in place of an assessment by its own educational psychologists (see paragraph 12).
23. On 25 July 2023, the Council's Cabinet approved the Council's EHCP Timeliness Recovery Plan to try to deal with the issues it has been experiencing due to a lack of capacity in its Educational Psychology Service and Special Educational Needs Team. This report and Recovery Plan is publicly available. The report also explains the Council had only been able to issue EHC Plans within the statutory 20 weeks in 27% of cases in June 2023.
24. The Council has acknowledged that, in teams with staffing vacancies, there have been gaps in communications with parents. It has produced an information leaflet for parents who are awaiting assessment, advising them of the reasons for the delays. It also says it would provide parents with an update every three weeks.

Prioritisation of cases

25. From January 2023, the Council has introduced a triaging system for new requests for an EHC needs assessment. It now uses a 'vulnerability matrix' to assess priority. The children it has assessed as a priority included those:
- at a Key Stage Transfer;
 - in 'Education Other Than At School';
 - with attendance below 60%;
 - who had been excluded (fixed term and permanent);
 - out of education;
 - experiencing self-harming or suicidal ideation; or
 - on a Child Protection Plan, Child in Need or Looked After Children.

26. In the time before it introduced its triaging system, the Council said it had reviewed every child waiting for an EHC needs assessment that might be a priority.

K's case

27. K attends a mainstream primary school. She has special educational needs (SEN) and a diagnosis of an Autism Spectrum Disorder (ASD). Mrs J asked the Council to carry out a EHC needs assessment for K in July 2022. Mrs J says, at that time, K had been struggling to cope in school. K was due to move to secondary school in September 2023.
28. The Council agreed to carry out an EHC needs assessment in September. On 13 September it requested advice, including from its Educational Psychology Service.
29. In November 2022, January and February 2023, Mrs J emailed the Council, seeking an update. The Council's officer replied promptly, advising K's assessment was still awaiting assignment to an educational psychologist.
30. In February Mrs J complained to the Council. It replied at stage one of its complaints procedure acknowledging a delay. It advised:
- until it had completed its EHC needs assessment Mrs J and K would need to apply for a secondary school place through its mainstream admissions, as there was no guarantee it would issue an EHC Plan;
 - if it did issue an EHC Plan, its SEND Team would start consulting with schools;
 - it would provide Mrs J with regular updates (at least every three weeks) with a named officer.
31. Mrs J asked to escalate her complaint to stage two of the Council's procedure. Its reply accepted it had exceeded the statutory timescales for making a decision, so it upheld the complaint. It advised that, within 14 working days, it would nominate an officer to keep Mrs J updated on the progress of the EHC needs assessment and agree a communications protocol regarding the frequency of updates.
32. The Council completed its educational psychologist assessment in July. It decided to issue an EHC Plan and sent a copy of the draft plan to Mrs J for her comments in August.
33. The Council issued K's final EHC Plan on 22 September 2023.

Conclusions

34. We expect councils to follow the statutory timescales set out in the law and 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.
35. The Council decided to carry out an EHC needs assessment in mid-September 2022, and its SEND Team requested educational psychologist advice on 13 September. This means the educational psychologist's report should have been available by 25 October 2022 to comply with the six-week timeframe. The educational psychologist's report was not completed until 12 July 2023 – a delay of around 37 weeks. We note the Council's explanation of the problems facing its Educational Psychology Service. We also note its Recovery Plan. But the delay was not in line with the Code and was service failure.
36. This also meant the Council failed to issue a final EHC Plan within the 20 weeks statutory time-limit from the date of Mrs J's July 2022 request. It should have issued K's final plan around mid-December 2022. It issued the plan on 22 September 2023, a delay of over nine months. Failure to meet the 20 week deadline was service failure.
37. Mrs J says she did not receive updates from the Council, so she had to contact officers in the SEN team several times for updates. The Council's officer did respond and give updates. And, in response to Mrs J's stage one complaint, the Council said it would provide her with updates every three weeks. In its stage two response the Council said again its officer would contact her and agree a communications protocol. Mrs J says this did not happen. Based on this evidence, the Council failed to provide Mrs J with updates as agreed in its complaint response, which was fault.
38. Mrs J's application for an EHC needs assessment pre-dates the Council introducing its triaging, in January 2023, of which EHC needs assessments to prioritise for educational psychologist advice. The Council says it was reviewing priority before then. But in K's case, this did not result in a final EHC Plan before she moved to secondary school, a change in Key Stage (which the Council recognises as a priority). That was fault.
39. As there is fault in this case, we have to consider the injustice caused to Mrs J and K and recommend a remedy. The delay has caused Mrs J and K uncertainty and frustration. Mrs J says the Council's delay, during this key year, has contributed to K's distress. She says K attended taster days at schools that she felt were unsuitable.
40. In our draft report we recommended the Council make Mrs J a symbolic payment of £100 for every month of delay over the statutory timescale until the final EHC Plan was issued.
41. In response to our draft report, the Council advised it had completed the EHC Plan. So we have recommended a payment of £1,000, calculated at £100 for each month of delay.
42. If Mrs J feels the educational support set out in the EHC Plan or school named does not meet her daughter's current needs, she has a right of appeal to the SEND Tribunal. We cannot direct changes to the sections about education or name a different school. Only the Tribunal can do that.

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43. Where we find fault, we go on to recommend an organisation makes improvements to its service. In this case we are satisfied at this stage the Council has fully considered the matter at a recent Cabinet meeting and through its public Recovery Plan. So our recommendations for service improvements are limited to recommendations regarding democratic oversight and public information.

Recommendations

44. 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)
45. In addition to the requirements set out above, the Council has agreed, within three months of the date of this report, to start to:
- prepare quarterly reports to its relevant committee, to ensure democratic oversight of its Recovery Plan; and
 - publish updates on its website, so those affected by delays can track progress.
46. To remedy the personal injustice, the Council has agreed, within one month of the date of this report to:
- apologise to Mrs J for the avoidable distress, frustration, and time and trouble caused by the delay. We publish [guidance on remedies](#) which sets out our expectations for how organisations should apologise effectively to remedy injustice. The Council should consider this guidance in making the apology we have recommended in our findings; and
 - pay Mrs J a symbolic payment of £1,000 for the distress to her for the delay in issuing K's EHC Plan.
47. The Council has agreed the recommendations and should provide us with evidence it has complied with them.

Final decision

48. We uphold the complaint. There was fault by the Council which caused an injustice to Mrs J and K. It has agreed to our recommendations so we have completed our investigation.

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