

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

**Investigation into a complaint against  
West Sussex County Council  
(reference number: 20 001 685)**

**24 June 2021**

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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
Mr X	The complainant's partner
Y	Their son
Z	Their daughter
Provider E	Council arranged tuition provider for Y

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## Report summary

### Education and Childrens Services

Mrs X complained the Council refused to assess her adopted son, Y, for direct payments or respite care. Mrs X also complained Y was out of full-time education since February 2020.

### Finding

Fault found causing injustice and recommendations made.

### Recommendations

To remedy the injustice caused, we recommend within one month of the date of this report the Council should:

- pay Mrs X £1,250 to remedy the injustice caused by the gatekeeping of its assessment process and the delays this caused, delays in the Council's complaint process and delays in the provision of respite care, all of which caused Mrs X and her family avoidable time, trouble and distress;
- apologise to both Mrs X and Y for the loss of education, loss of support, delay and distress experienced;
- reassess the current respite care provided and determine if this is an appropriate level of respite for Y and his family in line with the Council's policies;
- pay Mrs X £1,800 to remedy the Council's delay in finding a suitable school placement for Y and the subsequent missed education. Mrs X may use this as she sees fit for Y's educational, social and mental health needs.

Within three months of the date of this report the Council should review its process for assessment following a referral to its Multi-Agency Self Guarding Hub team to ensure it is meeting its Section 17 duty for all children and not simply those who fall under specific criteria to prevent gatekeeping of its assessment process.

Within six months of the date of this report the Council should complete an audit or review of the educational provision available in its area for children and young people who have special educational needs or a disability to ensure there are enough places to meet demand.

The Council has accepted our recommendations.

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## **The complaint**

1. Mrs X complained the Council refused to assess her adopted son, Y, for direct payments or respite care.
2. Mrs X also complained Y was out of full-time education since February 2020.
3. Mrs X says the Council failed to respond to requests for escalation of her complaint. She says this situation has placed an added stress on the rest of the family and caused a financial burden in the absence of a council assessment and support.

## **Legal and administrative background**

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

4. 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*)
5. 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 report with Ofsted.
6. SEND is a tribunal that considers special educational needs. (*The Special Educational Needs and Disability Tribunal ('SEND')*)
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*)

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

8. A child with special educational needs may have an Education, Health and Care (EHC) Plan. An EHC Plan describes the child's special educational needs and the provision required to meet them.
9. The procedure for assessing a child's special educational needs and issuing an EHC Plan is set out in regulations and Government guidance.
10. A Plan should name the school, or type of school, the child will attend. Councils must consult with schools before naming them in a child's Plan. The law says that councils must name a parent's preferred school in their child's Plan, so long as the school is suitable, and the child's attendance would not be an inefficient use of resources. (*Children and Families Act 2014, section 39*)
11. If a council names a school within an EHC Plan the school must admit the child named in the EHC Plan. (*Special educational needs and disability code of practice: 0 to 25 years 2015, Section 9.83*)
12. A council must respond to all requests for an EHC Plan. It must decide whether an assessment is needed within six weeks of receiving the request. The whole process from the point of request to a council issuing the final EHC Plan must take no more than 20 weeks. (*Special Educational Needs and Disability (SEND) Regulations 2014, Section 13 (2)*)

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13. Once a council completes the EHC Plan it has a legal duty to deliver the educational and social care provision set out in the Plan.

### **Children in Need**

14. The Children Act 1989 imposes a duty on a council to safeguard and promote the welfare of children within their area who are 'in need'. (*Children Act 1989, section 17(1)*)
15. A child in need is defined in the Act as a child who is unlikely to achieve or maintain a satisfactory level of health or development, or their health or development will be impaired, without the provision of services; or a child who is disabled. (*Children Act 1989, section 17(10 and 11)*)
16. Where it appears to a council a child is in need a council may undertake an assessment of the needs of the child to determine what services to provide and what action to take. (*Children Act 1989, Schedule 2, section 3*)
17. The assessment process should take no longer than 45 working days from the point of referral. An assessment is complete once the social worker has discussed it with the child and family and the team manager has viewed it and approved the assessment. (*Working Together to Safeguard Children 2018, section 82 to 84*)

### **Council policy for child and family assessment**

18. The Council's policy says its Child Disability Social Work Team offers a specialist social work assessment and service for three groups of children who have:
- a severe learning and/or severe physical disability;
  - lifelong complex health needs;
  - autism with moderate or above learning disability and mental health needs.
19. The Council will consider eligibility on an individual basis for children who do not meet these criteria.
20. For children who do not meet these criteria but fall under the remit of the Section 17 provisions, the Council should complete an assessment through its Early Help or Assessment and Intervention teams.

### **Education for children with health needs**

21. Councils must keep educational provision under review to ensure there is sufficient provision available to meet children and young people's needs. (*Children and Families Act 2014, section 27(2)*)
22. Councils must "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". (*Education Act 1996, section 19(1)*)
23. *Suitable education* means efficient education suitable to a child's age, ability and aptitude and to any special educational needs they may have. (*Education Act 1996, section 19(6)*)
24. The Council must consider the individual circumstances of each particular child and be able to demonstrate how it made its decision.
25. The education provided by a council must be *full-time* unless a council determines that full-time education would not be in the child's best interests for reasons of the child's physical or mental health. (*Education Act 1996, section 3A and 3AA*)

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26. We have issued [guidance](#) on how we expect councils to fulfil their responsibilities to provide education for children who, for whatever reason, do not attend school full-time. (*Out of school... out of mind? How councils can do more to give children out of school a good education, published in 2016*)
27. We made six recommendations. Councils should:
- consider the individual circumstances of each case and be aware that a council may need to act whatever the reason for absence (with the exception of minor issues that schools deal with on a day-to-day basis) – even when a child is on a school roll;
  - consult all the professionals involved in a child's education and welfare, taking account of the evidence in coming to decisions;
  - decide, based on all the evidence, whether to require attendance at school or provide the child with suitable alternative education;
  - 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.
28. Our role is to check councils carry out their duties properly and provide suitable education for children who would not otherwise receive it. We do not have the power to consider the actions of schools.

### **Statutory complaints process**

29. There is a formal procedure, set out in law, which a council must follow to investigate certain types of complaint. It involves three stages.
- Local resolution by the Council (Stage 1).
  - An investigation by an independent investigator who will prepare a detailed report and findings overseen by an independent person (Stage 2). The Council then issues an adjudication letter which sets out its response to the findings.
  - If the person making the complaint asks, an independent panel to consider their representations (Stage 3).
30. Regulations set out the timescales for the process. A council should provide a response at Stage 1 within 10 working days and at Stage 2 within 25 working days (or exceptionally within 65 working days). A council should call a review panel at Stage 3 within 30 working days.

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

31. We produced this report after examining relevant documents and interviewing the complainant.
32. We gave the complainant and the Council a confidential draft of this report and invited their comments. We took into account the comments received before finalising the report.

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## What we found

### Situation before July 2019

33. Mr and Mrs X adopted two children, Y and Z. Both Y and Z are primary school age at the time of this report.
34. Z has support needs due to early childhood experiences. Y has a diagnosis of Foetal Alcohol Spectrum Disorder (FASD) and a secondary diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). Y's FASD causes him to be volatile and aggressive at times with his behaviour often unpredictable. Y can become overwhelmed by sensory information and struggles in social situations.
35. Y had input from a Chartered Clinical Psychologist Trauma Specialist and adoption services before contact with the Council.
36. Y had an identified key person at his school, a teaching assistant who had Special Education Needs (SEN) training.

### What happened

37. In July 2019 Y's aggressive and angry behaviour increased. Y's grandparents could no longer help in supporting Mr and Mrs X with childcare. Y's school requested an EHC Plan Needs assessment from the Council for Y on 16 July 2019.
38. The Council agreed to complete an EHC Plan Needs assessment on 27 August 2019.
39. Y's identified key person left the school in the summer of 2019. The School arranged for four generalised teaching assistants to provide Y with one-to-one support for 32.5 hours a week.
40. Y's attendance at school became sporadic in the autumn term of 2019.
41. The Council produced Y's draft EHC Plan on 5 November 2019 and asked for comments from the school and Mr and Mrs X. The School said it could not cope with Y's needs.
42. The Council issued Y's EHC Plan on 2 December 2019. It outlined:
  - the Council and Mr and Mrs X would find an independent school for pupils with Social, Emotional and Mental Health Needs for Y;
  - Y's school should provide educational provision for Y through 27.5 hours one-to-one support across the school week through the resources and funding already available; and
  - the level of support Y would need in mainstream education until placement at a new school could be found.
43. The Council and Mr and Mrs X began to consult with schools to secure a place for Y. The Council contacted four schools about availability. Three schools had no availability. School 2 agreed to a taster session on 13 February 2020 for Y.
44. Y attended the taster session on 13 February 2020, but School 2 advised it could not meet Y's needs. School 2 called the Council's Multi-Agency Safeguarding Hub (MASH) for advice about certain behaviours and comments Y made. The Council's MASH encouraged School 2 to make a referral and it subsequently did.

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45. On the back of the MASH referral, the Council's Child Disability Team applied for home tuition, through Provider E, for Y on 18 February 2020 to supplement mainstream education. The Council also contacted three further schools to make enquiries for Y.
  46. Y's school excluded him for two and a half days following aggressive behaviour on 24 February 2020. Mrs X contacted adoption support who also contacted the Council's MASH about Y. Mr and Mrs X agreed with the school that Y should not return to the school following his exclusion period ending. The Council contacted Mrs X about the offer of home tuition through Provider E as alternative provision to in school learning.
  47. Provider E met with Mrs X and Y on 9 March 2020. Following this meeting Provider E recommended they provide a package of 15 hours a week of tuition for Y starting in April 2020.
  48. Y's Special Guardianship and Adoption social worker referred Y to the Council's MASH on 10 March 2020 to get a Child and Family assessment completed to set up respite care, direct payments or a personal budget. The Council said Y did not have a severe learning disability or Autism alongside a moderate learning disability so was not eligible for social care intervention. The Council provided details of the support available through the "*Local Offer*" website. Mrs X disputed the Council's decision and provided details of Y's diagnosing clinician and made a formal complaint to the Council.
  49. The Council provided its Stage 1 response on 16 April 2020. It said:
    - Y did not meet the Council's criteria for lifelong services from the Council's Child Disability Team. Therefore, Y was not eligible for direct payments; and
    - the Child Disability Team provided specialist social work service for children with the most complex disability needs.
  50. Mrs X disputed the Stage 1 response on 26 April 2020. She said the Council's Child Disability Team was wrong to only offer Child and Family assessments for children with Autism (ASD) and/or a moderate/severe learning disability. Mrs X asked the Council to respond to her complaint at Stage 2.
  51. Provider E began to provide tuition to Y in May 2020. Due to the COVID-19 pandemic this tuition was online. This tuition ran until the end of the 2020 summer term. School 3 also contacted Mrs X to invite Y to a taster session in September 2020.
  52. Mrs X asked a solicitor for advice and chased the Council for a response three times in July 2020.
  53. The Council advised it would not progress to Stage 2 on 16 July 2020. It said:
    - it delayed in providing a response to Mrs X's dispute over the Stage 1 response. The Council offered Mrs X £50 to reflect this; and
    - the decision it made not to assess Y was in line with its policy so it had no reason to escalate to Stage 2.
  54. Mrs X complained to us.
  55. A new referral was made to the MASH on 22 July 2020. The Council decided it needed to complete a Child and Family assessment on this occasion despite saying Y's disability needs were not eligible for social work intervention.



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56. The Council completed Y's Child and Family assessment on 18 August 2020. The Council's social worker said the "*parents have suggested 6 hours a week*" respite care and the social worker agreed the family should "*be supported with regular consistent respite*". The Council said it needed to:
- consult its resources panel for advice on funding or resources for Y and the family;
  - continue supporting Y through home tuition until he transitioned to School 3; and
  - draw up a Child in Need Plan and complete a review of Y.
57. Provider E continued to provide tuition to Y in the Autumn 2020 term. This tuition was part home based and part based at its learning centre.
58. Y attended School 3 in September 2020 for taster sessions. School 3 advised it could not manage Y's needs. The Council contacted two further schools with School 4 advising Y could visit for a review and School 5 advising it was full. Mrs X declined School 4's invitation. Mrs X had previously decided this school was not suitable for Y due to the distance and lack of specialism in Y's needs. The Council offered two further schools to Mrs X in September 2020, but she declined these as unsuitable. Y went onto the waiting list for School 5 which Mrs X thought could be a suitable placement for Y.
59. Mrs X hired a solicitor to chase the Council for the support promised in the August 2020 Child and Family assessment. Mrs X also requested funding for an independent ASD assessment. The Council advised Mrs X to wait for the NHS assessment.
60. The Council arranged a planning meeting for 23 October 2020. At this meeting the Council agreed to:
- keep in place the 15 hours a week home tuition provided to Y;
  - arrange and fund six hours a week of respite care for the family; and
  - reimburse the six hours a week respite care the family had paid for from 1 September 2020, totalling £1,188.
61. Y began regular sessions of alternative provision with a youth support group for social and emotional education in December 2020 alongside Provider E.
62. The Council completed an emergency review of Y's EHC Plan on 21 January 2021. The emergency EHC Plan noted the following.
- Mr and Mrs X "*desperately need to find a nurturing SEN school for*" Y.
  - Mr and Mrs X praised the work of the home tuition provider with Y.
  - Y had been making progress with his home tuition sessions and began to attend at the learning centre. The home tuition provider agreed Y should attend a new school at the earliest opportunity with their assistance in transition.
  - The EHC Plan detailed what support Y would need in an educational setting but did not name a specific school.
63. The Council found a school to place Y on 26 March 2021 with the view to starting at this school in September 2021, using the summer term as an introduction for Y to the school.

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## Conclusions

### EHC Plan assessment and school placement

64. Regulations say a council must issue an EHC Plan as soon as practicable, and in any event within 20 weeks of receiving a request to assess a child. There are limited circumstances in which a council does not need to meet this deadline, but they do not apply in this case.
65. The school made the request on 16 July 2019, so the Council had until 3 December 2019 to issue the final EHC Plan.
66. The Council produced Y's EHC Plan on 2 December 2019. While this was within the statutory timescales, the EHC Plan failed to identify a school placement for Y. The Council did not name a school on Y's EHC Plan but simply referred to the type of school suitable for Y's needs. The Council was consulting with schools and can only have been doing so with a view to naming a school in Y's EHC Plan.
67. When a council has not identified a particular school, it can instead name a type of educational establishment within an EHC Plan. A council should specify mainstream education if a parent has not requested a particular school. But the Council should not do this when mainstream education is not suitable. The Council decided mainstream education was not suitable for Y since it said Y needed an independent school for pupils with Social, Emotional and Mental Health Needs.
68. The Council's revised draft EHC Plan on 20 January 2021 still does not name a specific school. Failing to name a specific school in Y's EHC Plan effectively left Y in mainstream education until the Council found a suitable school.
69. The Council said it did not name a school on Y's EHC Plan because it was not able to identify a specific school with availability despite extensive searches during the assessment period.
70. The Council had a responsibility to identify a suitable school for a child to meet their needs within 20 weeks of an EHC plan request. Parents should be consulted as part of this process but ultimately a council must decide on a school it believes is suitable to meet a child's needs. A council should consider what is in the best interest of a child whether this is placing a child at a school declined by a parent or against the wishes of a school.
71. Parents have a right of appeal to the Tribunal if they disagree with the school named, or lack of school named, in their child's EHC Plan. Since Mrs X had this appeal right to the tribunal, we cannot investigate the Council's decision not to name a school.
72. However, we can look at any delay in the assessment and creation of an EHC Plan as well as any failure by the Council to deliver the provision within an EHC Plan.
73. A council has a statutory duty to carry out actions outlined in an EHC Plan. Y's EHC Plan assessment committed the Council to finding him an independent school for pupils with Social, Emotional and Mental Health Needs and to provide one-to-one support in education. Delay in finding a suitable school placement for Y is fault.
74. The Council made several attempts to source a placement for Y at a suitable school. In total the Council directly contacted 11 schools from December 2019 to

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October 2020. Y had taster sessions at two schools who said they could not accommodate him. Mrs X also declined two other schools.

75. Mrs X has explored a number of schools for Y. While it is notable that Mrs X has advised some schools were not suitable for Y, she has identified several different schools she feels would be appropriate for Y. However, these schools have told Mrs X, or the Council, they are full, cannot meet Y's needs or have failed to respond entirely.
76. The failure of the Council to find a suitable school placement caused a delay in Y attending a suitable school for 16 months and left him without full-time education for slightly more than 13 months. The failure of the Council to find Y a suitable school placement before February 2020 also invoked the Council's Section 19 duty which is addressed separately in this report.
77. This fault meant the burden of finding a school placement has fallen significantly on Mrs X. As above, a parent should be engaged in the process. However, Mrs X has explored extensive school options since the Council was unable to source a suitable school placement for Y. The Council should be leading this process, not a parent.
78. The Council has a duty to keep SEN provision under review under Section 27 of the Children and Families Act to make sure the provision available in its area is sufficient to meet children and young people's needs. The lack of availability at SEN schools for Y suggests the Council is not meeting its duty to ensure sufficient provision.

#### **Child and family assessment**

79. A council should complete any requested assessment of a child who falls under the Section 17 criteria of the Children Act 1989. A council should take no longer than 45 working days from referral.
80. School 2 made the initial referral to the Council's Multi-Agency Safeguarding Hub (MASH) on 13 February 2020. The Council rejected Y for assessment on several occasions until the referral on 22 July 2020.
81. The Council's rationale for rejection of Y for assessment was that his disability did not meet its criteria for assessment with its Child Disability Team. The Council's MASH closed Y's referral without assessment because Y did "*not have a severe learning disability, or Autism alongside a moderate learning disability*" and while Y "*clearly has additional needs, his disabilities are not eligible to have social care intervention*".
82. The Council also said Mrs X was specifically asking for direct payments.
83. A council is entitled to have a specialist team to consider a specific range of needs. However, this specialist team cannot be at the expense of a council failing to assess other children who might meet the criteria for help under Section 17 of the Children Act. A council also cannot use a requested outcome from a person, such as direct payments, as reason not to complete the required assessment under the Act.
84. Y's disability and overall circumstance was not materially different between his exclusion in February 2020, prompting the second referral to the Council's MASH, and the referral on 22 July 2020. The Council accepted Y for assessment by MASH on 22 July 2020. On balance the Council should have accepted Y for assessment on 13 February 2020.

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85. The Council appears to be placing additional hurdles for people preventing assessment under Section 17 of the Children Act. Children in need are entitled to assessments if their parents want one. A council cannot deny assessment because a child does not meet threshold criteria, doing so is gatekeeping its assessment process.
  86. The Council failing to assess Y through its Assessment and Intervention Team on the first referral is fault. The Council should review its process for assessment following a referral to its MASH team to ensure it is meeting its Section 17 duty for all children who might be in need and not simply those who fall under specific criteria. The Council has advised it is currently completing a review of the eligibility criteria for its specialist disability service. Our recommendation will run concurrently with the Council's ongoing review.
  87. This fault caused a delay in Y's assessment of nearly 23 weeks.
  88. The Council's resource panel committed to supporting Y's family with funding for six hours respite care a week. The Council backdated this respite care cost to 1 September 2020.
  89. We cannot say for certain Y's family would have received respite if the Council had completed the Child and Family assessment sooner. However, the lack of difference in Y's situation between the first and last referral shows it is more likely than not the same level of support would have been provided. Because of the Council's delay Y's family seems to have missed out on the opportunity for respite since February 2020.
  90. While the Council committed to providing six hours a week respite care, this level of respite was suggested by the family. We have not seen anything to suggest the Council assessed Y's needs before determining an appropriate level of respite care. The Council has failed to carry out its own assessment of the appropriate level of respite care, this is also fault.

#### **Alternative provision**

91. Section 19 of the Education Act 1996 states councils have a duty to make suitable educational provision for children of compulsory school age who are absent from school because of exclusion, illness or otherwise.
92. The school excluded Y on 24 February 2020 for two and a half days and immediately made the Council aware. The school told the Council it was struggling to cope with Y. This was the consistent message since the summer of 2019 when the school first referred Y to the Council.
93. Mr and Mrs X, and Y's school, made the decision to keep Y at home because of the issues Y was experiencing at school. While Y remained on roll at his school he was no longer attending. Since the Council did not consider that Y's lack of attendance was unauthorised, this invoked the Council's Section 19 duty.
94. Government guidance on a council's section 19 duties recommends councils arrange education for a child from the sixth day of absence when it is clear a child would be away from school for 15 days or more. This means the Council should have put in place alternative provision for Y from 8 March 2020.
95. The Council acted to arrange a meeting between Mrs X, Y and a home tuition service. The Council acted without delay when arranging this meeting. However, the home tuition service did not have availability until after the Easter break. Mrs X confirmed this tuition started in May 2020. The Council's delay of two

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- months is fault. This fault caused Y to miss six weeks of education from 8 March 2020 without suitable alternative provision in place.
96. Since May 2020, the Council provided alternative provision through Provider E to Y both at home and, in the Autumn term, a mix of home and at the learning centre. The evidence shows Y made progress with this alternative provision and Mrs X has been positive about the impact of this provision for Y.
97. The most recent feedback from Provider E is that Y is making progress but is still working towards completing the number of academic tasks a day set as a goal for the Autumn term.
98. The alternative provision the Council arranged is only 15 hours a week with Provider E, falling short of full-time education. However, Provider E recommended 15 hours a week to begin. The most recent academic feedback from the tuition provider is that Y is making progress but would not be able to manage more academic tasks a day yet.
99. The Council supplemented Y's alternative provision in December 2020 with a youth support group for social and emotional education. The Council previously explored this in March 2020 but due to the COVID-19 pandemic was unable to provide this until December 2020.
100. Given Y's individual circumstances and the positive views Mrs X has about work done by Provider E, we consider it unlikely the Council providing full-time home education through Provider E would have been in Y's best interests. The COVID-19 pandemic has also restricted the Council's ability to arrange additional alternative provision outside of a traditional educational setting.
101. We do not find fault with the level of alternative provision the Council put in place from May 2020.
102. However, alternative provision is not a full substitute for a suitable school placement for any child. The fault of the Council in not finding a school placement for Y has continued to have an impact, albeit smaller, on Y and his family since the Council put in place the provision from Provider E.
103. Because of the COVID-19 pandemic, not all SEN schools have remained open since May 2020, with many moving to online learning. So it seems likely Y's alternative provision is a suitable, if not equal, replacement to remote learning through a school.
104. Most schools have been open for Y's age range from September 2020 through to the end of the year before closing again in January 2021. Primary schools in England also re-opened on 8 March 2021 for four weeks before the Easter holidays. We estimate this means Y has missed 18 weeks of education within a suitable school setting up to 2 April 2021.

### **Complaint handling**

105. The Council initially followed the Statutory Complaints process for Mrs X's complaint and provided a response at Stage 1. The Council declined progression to Stage 2 and directed Mrs X to us.
106. The Council should have provided Mrs X's Stage 1 response within 10 working days and the rejection of the Stage 1 appeal within 25 working days. The Council failed to meet either of these timescales. This is fault.
107. Additionally, Mrs X's complaint relates to Section 17 of the Children Act. This gave Mrs X a statutory right to progress to Stage 2 of the Council's complaint

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process. The Council was not allowed to refuse progressions to Stage 2. This is fault.

## Conclusions

### [Our guidance on remedies](#)

108. We expect bodies in jurisdiction to treat people fairly and with respect, and not to expose the public to unnecessary distress, harm or risk as a result of their actions or inactions. Such injustice cannot generally be remedied by a payment, so we usually seek a symbolic amount to acknowledge the impact of fault on the complainant. The amount depends on the circumstances of the case.
109. When we assess distress, we consider the complainant's individual circumstances (such as their state of health and age). In reaching a view on remedy we will consider all the circumstances including:
- the severity of the distress;
  - the length of time involved;
  - the number of people affected (for example, members of the complainant's family as well as the complainant);
  - whether the person affected is vulnerable and affected by distress more severely than most people; and
  - any relevant professional opinion about the effects on any individual.
110. A remedy payment for distress is often a moderate sum of between £100 and £300. In cases where the distress was severe or prolonged, up to £1,000 may be justified. Exceptionally, we may recommend more than this.
111. The Council was at fault for failing to find a suitable school placement for Y as it committed to do with Y's EHC Plan. This meant that for 16 months Y was not placed at a suitable school that would meet his needs. This fault also placed the burden of finding a school placement for Y disproportionately on Mrs X.
112. The Council was also at fault for failing to assess under its Section 17 duty in March 2020. This fault caused an avoidable delay of nearly 23 weeks in completing Y's assessment. The delay meant there was no respite provision for Y and his family during this time causing distress and frustration. When the Council did assess Y, we have not seen any evidence it considered Y's needs when deciding a suitable level of respite care, the Council simply agreed with Mr and Mrs X's suggestion. This caused a potential injustice as it may be that Y and Mrs X have not got sufficient respite care.
113. The Council caused additional delay from 18 August 2020, when it completed the assessment, to 23 October 2020 when it finalised the provision of respite care funding. This fault caused added financial strain and distress on Mrs X and her family.
114. The Council also failed to meet the timescales for the Stage 1 response or rejection of the Stage 1 appeal. The Council incorrectly refused Mrs X access to Stage 2 of the complaints process despite her having a statutory right to this. This caused Mrs X frustration and avoidable distress through continued delays in the process and blocking of her statutory rights to progress her complaint.

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115. Taken together the repeated and extensive faults by the Council caused a severe injustice to Y and his family. They experienced avoidable distress, frustration, loss of support and a suitable education as well as financial implications for the family.
  116. We consider the injustice Mrs X and her family experienced due to the Council's fault was both severe and prolonged. For this reason, we consider the Council should apologise to Mrs X and provide a payment of £1,250.
  117. The Council should also reassess the family's needs and determine an appropriate level of respite for Y and his family in line with the Council's policies.
  118. The lack of availability at SEN schools for Y suggests the Council is not meeting its duty to ensure sufficient provision. The Council should complete an audit or review of the educational provision available in its area for children and young people who have special educational needs or a disability to ensure there are enough places to meet demand.
  119. The Council's Section 19 duty also arose because of its failure to find a suitable school placement for Y before February 2020. This meant Y has been without suitable full-time education for over 13 months.
  120. Our guidance for fault resulting in a loss of educational provision recommends a payment of between £200 and £600 a month to acknowledge the impact of that loss.
  121. Given Y's particular needs and the impact of Y being out of education had on his family we consider a remedy of £600 a month reflects the Council failing to provide any suitable alternative provision until May 2020. Including the Easter holidays, this amounts to six weeks without any alternative provision which the Council is at fault for.
  122. Under normal circumstances we would ask the Council to provide a payment of £200 for each academic month to Y for education missed while alternative provision was in place due to the fault of the Council in not finding a school. When considering the impact of COVID-19, Y was without full time education, but in receipt of alternative provision, for 18 weeks.
  123. The total of Y's missed education at £600 a month for six weeks and £200 a month for 18 weeks amounts to £1,800.
  124. The overall delays from the Council also caused Mrs X to get legal help to pursue the finalisation of the Council support.
  125. We can understand why Mrs X looked for independent support given the repeated delays and fault by the Council and how that impacted on her family. It is also evident Mrs X did not think the Council was doing enough to find Y a school placement and there were long and unreasonable delays, a position supported by this report.
  126. However, Mrs X did not need to approach a solicitor, she had the option of approaching us (a free service) or the tribunal. Approaching a solicitor was Mrs X's choice and not a direct cause of the fault by the Council. For this reason, we cannot justify recommending the refund of any legal fees by the Council.

## **Recommendations**

127. 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



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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*)

128. In addition to the requirements set out above, within one month of the date of this report the Council has agreed to:
- pay Mrs X £1,250 to remedy the injustice caused by the gatekeeping of its assessment process and the delays this caused, delays in the Council's complaint process and delays in the provision of respite care, all of which caused Mrs X and her family avoidable time, trouble and distress;
  - apologise to both Mrs X and Y for the loss of education, loss of support, delay and distress experienced;
  - reassess the current respite care provided and determine if this is an appropriate level of respite for Y and his family in line with the Council's policies; and
  - pay Mrs X £1,800 to remedy the Council's delay in finding a suitable school placement for Y and the subsequent missed education. Mrs X may use this as she sees fit for Y's educational, social and mental health needs.
129. Within three months of the date of this report the Council agreed to review its process for assessment following a referral to its MASH team to ensure it is meeting its Section 17 duty for all children and not simply those who fall under specific criteria to prevent gatekeeping of its assessment process.
130. Within six months of the date of this report the Council agreed to complete an audit or review of the educational provision available in its area for children and young people who have special educational needs or a disability to ensure there are enough places to meet demand.

## **Decision**

131. We have completed our investigation as we have found fault causing injustice. The action we have recommended is a suitable way to remedy this.