

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

**Investigation into a complaint about  
Wirral Metropolitan Borough Council  
(reference number: 21 000 181)**

**3 February 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

Ms Z	A representative
Mr Y	A young person
Ms X	Mr Y's mother

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## **Report summary**

### **Education**

Ms Z complained on behalf of Mr Y and his mother, Ms X, that the Council:

- took too long to review Mr Y's Education, Health and Care (EHC) plan, despite being aware he was not in education, failed to secure any of the provision in the EHC plan and failed to issue an amended plan or other decision which delayed their appeal rights
- failed to act in line with Care Act duties

As a result, Mr Y missed out on education and social care support and the Council's proposed remedy did not reflect the injustice to them.

### **Finding**

Fault causing injustice and recommendations made.

### **Recommendations**

To remedy the injustice, we recommend the Council:

- pays Mr Y £4,400 to reflect the poor practice identified in this report which resulted in a loss of education;
- pays Ms X £250 to reflect her avoidable distress and time and trouble;
- apologises in writing to Mr Y and Ms X for the fault and injustice;
- completes its review of the annual review process including compliance with the statutory timescales set out in this report. We will require a copy of the review which should set out any changes to be made to SEN procedures; and
- arranges training with relevant officers about specific matters set out later in the report.

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## The complaint

1. Ms Z (a representative) complained on behalf of Mr Y and his mother Ms X, that Wirral Metropolitan Borough Council (the Council):
  - took too long to review Mr Y’s Education, Health and Care (EHC) plan, despite being aware he was not in education, failed to secure any of the provision in the EHC plan and failed to issue an amended plan or other decision which delayed their appeal rights
  - failed to act in line with Care Act duties.
2. Ms Z said Mr Y missed out on education and social care support and the Council’s proposed remedy did not reflect the injustice to Mr Y and Ms X.

## Legal and administrative background

### The Ombudsman’s role and powers

3. 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”.
4. We cannot investigate a complaint if someone has appealed to a tribunal. (*Local Government Act 1974, section 26(6)(a), as amended*)
5. The SEND tribunal considers special educational needs. (*The Special Educational Needs and Disability Tribunal (‘SEND’)*)
6. We cannot investigate complaints about what happens in schools. (*Local Government Act 1974, Schedule 5, paragraph 5(b), as amended*)
7. Complaints about Education, Health and Care (EHC) plans may be within our remit depending on the complaint. We can investigate a complaint about an EHC plan if:
  - The action relates to an administrative function of the council.
  - The action is taken by or on behalf of the council.
  - The action is not excluded by the provisions in paragraphs four to six.
8. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)
9. Some of the events in this complaint are late, but we have investigated them anyway. Ms X was dealing with the death of a close relative and Mr Y also had a period of illness. And then there was the COVID-19 pandemic from March 2020 when many public services were closed or stretched for several months. These are appropriate reasons for us to use discretion to investigate.
10. 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

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complaint. We refer to this as ‘injustice’. If there has been fault which has caused an injustice, we may recommend a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

### **Relevant law and guidance: education**

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. The Special Educational Needs Code of Practice (the Code) is statutory guidance which councils should have regard to. Relevant paragraphs are:
  - a) There must be a review of an EHC plan at least every year. The review considers the appropriateness of the EHC plan and whether any changes are needed, including any changes to the education placement. (*paragraph 9.166*)
  - b) Within four weeks of the review meeting, the local authority must decide whether to keep, cease or amend the EHC plan and must notify the parent. If amendments are needed, the local authority must start the amendment process without delay. (*paragraph 9.176*)
  - c) The local authority must send the current EHC plan and a notice setting out proposed amendments and give the parent at least 15 calendar days to comment. It must issue an amended plan as quickly as possible and within 8 weeks of the original amendment notice. (*paragraphs 9.184- 9.186*)
  - d) Young people with SEN turning 18 may be eligible for adult care services and so the council must carry out an adult care transition assessment where this is of benefit to the young person and they are likely to need adult care and support. There is no set age for this assessment.
13. Where a young person aged 18 or over stops attending the educational institution in their EHC plan and so is no longer receiving education or training, a council may not cease to maintain that plan unless it has reviewed the plan and established the young person does not want to return to education or training. Following the review, if the council establishes the young person wants to return to education at another institution and determines this appropriate, the council must amend the EHC plan as it thinks necessary. (*SEND Regulations 2014, regulation 30*)
14. The Coronavirus Act 2020 temporarily modified the duty in section 42 of the Children and Families Act 2014 to arrange or secure the SEN provision in an EHC plan. The change meant the absolute duty to secure or arrange provision was modified between March and July 2020 to a requirement to use ‘reasonable endeavours’ to do so.
15. *Supporting vulnerable children and young people during the coronavirus outbreak – actions for educational providers and other partners* (in force between March and August 2020) said education providers and councils should identify vulnerable children and young people, (including those not in education, those with EHC plans and those who are classed as vulnerable at the discretion of the council) and consider how best to support their welfare and education both remotely and on-site. There should be a risk assessment.

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## Relevant law and guidance: adult social care

16. A council must carry out an assessment for any adult with an appearance of need for care and support. (*Care Act 2014, section 9*)
17. The Care Act spells out the duty to meet eligible needs (needs which meet the eligibility criteria). (*Care Act 2014, section 18*)
18. An adult's needs meet the eligibility criteria if they arise from or are related to a physical or mental impairment or illness and as a result the adult cannot achieve two or more of the following outcomes and as a result there is or is likely to be a significant impact on well-being:
  - Managing and maintaining nutrition
  - Maintaining personal hygiene
  - Managing toilet needs
  - Being appropriately clothed
  - Making use of the home safely
  - Maintaining a habitable home environment
  - Accessing work, training, education
  - Making use of facilities or services in the community
  - Carrying out caring responsibilities.

*(Care and Support (Eligibility Criteria) Regulations 2014, Regulation 2)*
19. The Care Act explains the different ways a council can meet a person's eligible needs including by arranging a care home placement or care and support at home or by providing counselling, information, advice and advocacy. (*Care Act 2014, section 8*)
20. If a council decides a person is eligible for care, it should prepare a care and support plan which specifies the needs identified in the assessment, says whether and to what extent the needs meet the eligibility criteria and specifies the needs the council is going to meet and how this will be done. The council should give a copy of the care and support plan to the person. (*Care Act 2014, sections 24 and 25*)

## How we considered this complaint

21. We produced this report after examining relevant documents and speaking to Ms Z.
22. We shared a draft report with Ms Z and the Council and took comments into account before issuing this final report.
23. Under our information sharing agreement, we will share this decision with the Office for Standards in Education, Children's Services and Skills (Ofsted).

## What happened

### Education

24. Mr Y is a young person with autism and an EHC plan. He went to a specialist school until June 2019 when he finished Year 12. Mr Y's final EHC plan in March 2019 named his placement as 'a mainstream college with support.' The plan said there would be an early review in the Autumn Term.

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25. The Council consulted with College A which offered Mr Y a place. Mr Y and Ms X were happy with this placement and Mr Y went to some taster sessions over the summer. The adult social care team was organising accompanied transport (see later in this report). The taster sessions did not go well and College A withdrew the offer in July, leaving Mr Y without a placement for the start of the academic year.
  26. The Council consulted with three colleges in July. It also consulted with College B (a mainstream college) in September 2019.
  27. The Council told us there was a meeting in October at College B (calling this meeting an 'informal resolution meeting'), but no minutes were retained although the then Head of SEN attended. Mr Y's social worker in the transitions team (see later in this report) noted in their records that the meeting was supposed to be an annual review. But it turned into a planning meeting and the SEN co-ordinator suggested at the meeting that Mr Y's EHC plan may cease. The outcome was College B was due to respond to the Council's consultation and taster sessions for Mr Y were to be arranged.
  28. College B responded to the consultation in October saying Mr Y would need a long transition. Mr Y visited College B, but he did not like it and Ms X was also not keen.
  29. In December, Ms X asked for an annual review as soon as possible.
  30. There was an annual review in January 2020. The minutes noted:
    - Ms X asked for a specialist college out of the area and was visiting one in Brighton
    - Attendees said the EHC plan needed updating or amending
    - Mr Y had been offered an 'assessment place' at College B to do a life skills course.
  31. The Council told us that the placement at College B was available with additional funding to enable Mr Y to start attending, but Ms X declined the placement and was looking for a residential college.
  32. Ms Z put in a late appeal to the SEND tribunal against the EHC plan of March 2019, which was rejected as it was out of time.
  33. The Council issued a draft EHC plan in April and told us that Ms X did not respond to it. Ms X told us she never received it. The Council sent us a screen shot of its computer system indicating the relevant officer had sent a copy of the draft EHC plan for posting to Ms X.
  34. The Council told us Ms X made it clear she wanted an out of borough placement and was looking at colleges, but she never offered a preference and so it finalised Mr Y's EHC plan with a provision type, so she could use her right of appeal. People can appeal to the SEND tribunal when there is a failure to name a school, or they are dissatisfied with the school named or type of school.
  35. The Council issued a final EHC plan in May accompanied by a letter setting out Mr Y's appeal rights. Section I of the EHC plan (the placement) said '*a further education college.*' The plan also said (under Section J: personal budget) that the Council would provide one-to-one support for Mr Y's transition period.
  36. Ms X told us she never received the letter or final EHC plan. The Council provided me with a screenshot of its computer system indicating the SEN co-ordinator sent

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the final plan and letter to Ms X by post. The Council told us in future it would send all final EHC plans by recorded delivery so they could be tracked.

37. Ms X moved out of the area in September 2020. She complained to the Council in October. The Council upheld the complaints and offered a payment of just under £900 to recognise Mr Y's loss of education. The Council accepted:
- It failed to provide alternative provision for Mr Y when College A withdrew the offer
  - It did not communicate the outcome of an annual review in January 2020 and this prevented a right of appeal
  - It did not obtain updated social care advice
  - It failed to complete an annual review within statutory timescales.

### **Adult social care**

38. Mr Y's case was initially with the Council's transitions team. That team completed a social care assessment under the Care Act 2014 (see paragraph 16) which determined Mr Y was eligible for adult social care support. The assessment indicated Mr Y and Ms X did not want support while he was at school because Ms X was meeting most of his care needs and introducing new workers would be difficult. The case transferred to the adult social care team at the beginning of 2019. Ms X called the social worker to say Mr Y had been ill and her father had died recently.
39. The social worker tried to contact Ms X by phone several times between February and March. At the end of March, Ms X told the social worker Mr Y was going to be starting college in September.
40. At the end of April, the social worker visited Ms X and Mr Y at home. She noted Mr Y was willing to have four hours a week of outreach support. The social worker referred the case to a team in the Council which was responsible for finding agencies who could provide outreach support. The social worker started to look into support for transport for Mr Y for when he started College A in September.
41. In May the social worker told Ms X she had found an agency which could provide the outreach support. In June, Ms X said Mr Y would need an escort and a taxi to take him to and from college. The agency agreed to provide a support worker to be Mr Y's escort in the taxi.
42. In July, the social worker made several attempts to contact Ms X to give her an update. The social worker noted Mr Y's care and support plan was with management for approval. It was approved in the middle of July.
43. Ms X called the social worker to say College A had turned Mr X down for a place. Ms X was considering another college.
44. The social worker visited Ms X and Mr Y in the middle of September. Ms X apologised for not always replying to emails and messages. They discussed outreach support with the agency and Ms X said she was anxious about introducing someone who did not know Mr Y. She suggested she might like some respite care and said she had received a direct payment in the past, but she found it confusing to manage.
45. The social worker looked into a voluntary project which provided work opportunities for adults with autism. Mr Y visited the voluntary project in October 2019.

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46. In November, the social worker noted further difficulties getting in touch with Ms X. They spoke at the end of November. Ms X said she felt College B may not be suitable and was unhappy about College A withdrawing the place.
47. The voluntary project offered Mr Y a work placement two days a week in December.
48. Ms X told the social worker she wanted to appeal Mr Y's EHC plan. She said she was concerned the Council wanted to cease to maintain the plan. Ms X felt Mr Y needed education, not just social care. The social worker confirmed the agency was still willing to provide the outreach hours.
49. There continued to be difficulties contacting Ms X by phone. In the middle of January 2020, Ms X told the social worker the number they had on file was her daughter's mobile. Ms X provided an alternative number. She said she was going to tribunal about Mr Y's education placement. The social worker said meantime Mr Y could have some social care support. Ms X said she did not like the voluntary project, she wanted Mr Y to go to college and intended to look at residential colleges out of the area. Ms X declined outreach support for Mr Y saying she did not want to have to introduce new support workers to Mr Y and they had too much to deal with at present.
50. In March 2020, the government ordered the first lockdown; schools and colleges closed. The records indicate the social worker had been redeployed to a different team. The social worker emailed Ms X in the middle of May to see if she was still seeking support for Mr Y.
51. A social worker completed a further social care assessment (under the Care Act 2014) between April and June 2020. The assessment noted Ms X and Mr Y may be moving soon. Ms X said she wanted Mr Y to have some support to access the community. The assessment described the support Ms X provided with personal care, eating and drinking, housework, laundry and dressing. The assessment noted:
- Mr Y had the potential to develop skills to become more independent.
  - He needed regular staff to support him to access the community.
  - He had no road safety and could not use public transport independently.
  - He had some challenging behaviour.
  - He had been due to start another college in September 2019; adult social care arranged a taxi and a support worker to transport him, but the placement fell through and Ms X declined a local college. He had been out of education since leaving special school; he had been volunteering at the school once a week but wanted to find a college place. Ms X had been searching for somewhere suitable.
  - He had been offered a support worker to get to and from college and to access work/learning but not taken this up. His special school offered a place one day a week to help the teachers then this stopped because of lock down.
  - He was meant to be moving house, but this did not happen.
  - Ms X confirmed she had received a copy of the assessment in June 2020.
52. The social worker spoke to Ms X in June, she said she did not want any support from adult social care, that she and Mr Y had been self-isolating and they intended to move.

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53. The Council sent us a care and support plan for Mr Y which is mainly blank apart from a date of October 2020 and a note that Mr Y had moved to a different area so his case would be closed. The care and support plan described Mr Y's eligible needs. It noted that introducing a new support agency was not felt to be appropriate.
54. The Council did not uphold Ms X's complaint about a failure to provide adult social care support.

## Conclusions

### **The Council took too long to review Mr Y's Education, Health and Care (EHC) plan despite being aware he was not in education, failed to secure any of the provision in the EHC plan and failed to issue an amended plan or other decision which delayed their appeal rights**

55. The Council was at fault because:
- There was a problem when the identified place at College A fell through in Summer 2019. This was because there was limited time before the start of term in September for the Council to consult with colleges and to identify a suitable alternative placement, or make sure it had other arrangements in place, to meet the duty to secure the SEN provision in Mr Y's EHC plan in line with Section 42 of the Children and Families Act 2014. The meeting in October 2019 should have been an annual review to be in line with Regulation 30. It was intended as an annual review because there was a suggestion to end the EHC Plan even though there was no indication that Mr Y did not want to return to training or education. But the Head of SEN changed the meeting to a planning meeting. This was fault. The failure to keep a written record of the discussion in the meeting was an additional administrative fault.
  - Following the review, the Council should have decided within four weeks whether to cease or maintain Mr Y's EHC plan or to amend it and should have notified Ms X of its decision. It should have sent a notice of proposed amendments and given Ms X time to comment. The failure to make these decisions or to notify Ms X accordingly was not in line with paragraph 9.176 and 9.184 to 6 of the Code and was fault.
  - Amendments to Mr Y's EHC plan should have been made within 12 weeks of the annual review. Had a review taken place in October 2019, an amended EHC plan could have been issued by around the end of December 2019 which would have given Ms X a right of appeal.
56. Had the Council kept to the statutory timescale set out in the last paragraph, it is likely Mr Y's amended EHC plan would have named College B with additional support, as the Council's view was this placement and provision was appropriate to meet Mr Y's needs. Ms X could then have appealed the SEN provision and the placement in December 2019.
57. In addition, at the start of the first national lockdown in March 2020, the Council's SEN department failed to identify Mr Y as a vulnerable young person with an EHC plan who was out of education. This was fault as it was not in line with the guidance described in paragraph 15. There was a failure to complete a risk assessment on Mr Y and to consider how best to support his education and welfare between March and August 2020 when schools and colleges were closed.

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58. The Council's fault caused a loss of appeal rights. It also meant Mr Y was out of education because of the unresolved dispute about appropriate provision.
59. The Council issued a final, amended EHC plan in May 2020. While this was much delayed as described above, it gave Ms X appeal rights. Although Ms X says she did not receive a copy of the final plan, we are satisfied the Council sent it. The Council has made changes so that final EHC plans are sent recorded delivery. This means the Council can track the letters if a problem arises in future.

### **The Council failed to act in line with Care Act duties**

60. There was no fault by the Council as it acted in line with the duties in section 9 and 18 of the Care Act 2014. It completed assessments of Mr Y's social care needs, decided he was eligible for social care support and offered provision to meet his eligible unmet needs – support to access the community, support with travelling to and from college and a specialist voluntary placement. The records indicate Ms X was unsure about introducing new workers into Mr Y's life and declined adult social care support and was instead focused on Mr Y's education.
61. There should have been a fully completed care and support plan including all the provision the Council had offered to meet Mr Y's eligible social care needs. The plan disclosed by the Council was completed after the family had moved from the area and there was no evidence Ms X received a copy. While the Council failed to act in line with sections 24 and 25 of the Care Act 2014 by not providing a care and support plan, we do not consider this fault caused any injustice. This was because the offers of care and support were made clear to Ms X and she declined them.
62. Mr Y is an adult and the Care Act requires the Council to consult with him directly about his wishes and views around social care support. There is no evidence in the records that officers in the adult social care team asked Mr Y for his views or about whether he wanted social care support, irrespective of Ms X's views and preferences. This was fault, but as Ms X was meeting Mr Y's social care needs there is insufficient evidence of injustice to Mr Y.

### **Recommendations**

63. 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*)
64. In response to our enquiries about how it calculated the payment of £900 it already offered, the Council accepted this was not in line with our published Guidance on Remedies. The Council offered £4,400 as an increased remedy.
65. We have taken into account our guidance which suggests a monthly payment of between £200 and £600 for lost education (depending on the circumstances) and the uncertainty about what education might have been available to Mr Y between the end of March and August 2020. Most education institutions were closed and councils only had to use reasonable endeavours to secure provision on an EHC plan. We are satisfied £4,400 is an appropriate remedy to reflect the loss of education for Mr Y from September 2019 to July 2020.
66. The Council will:
- Pay Mr Y £4,400 to reflect the impact of the loss of education.
  - Pay Ms X £250 to reflect her avoidable distress and time and trouble.

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- Apologise in writing to Mr Y and Ms X for the fault identified in this report and the injustice.
67. The Council also told us it was carrying out a review of the annual review process. The Council accepted our recommendation for this to include a review of the SEN team's performance with regard to the statutory timescales set out in this report. We will require a copy of the review which should set out any changes to be made to SEN procedures.
68. In addition, the Council will arrange training for SEN officers about:
- Actions to take when a placement breaks down
  - Working with young people between the ages of 18 and 25
  - EHC plan timescales.
69. Finally, as well as posting EHC plans securely, which we endorse, we recommend the Council should also send copies by secure email as well, where appropriate.
70. We are pleased to note the Council has agreed to take the above actions which we consider remedy the injustice to Ms X and Mr Y and will reduce the chance of a recurrence in other cases.

## **Decision**

71. We completed our investigation. We upheld complaints about the EHC plan process. We did not uphold complaints about adult social care. We made recommendations including an apology, payments and improvements to services.