

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

**Investigation into a complaint against
Bedford Borough Council
(reference number: 17 014 669)**

16 October 2018

The Ombudsman's role

For 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

Mr X	The complainant
Mrs X	The complainant's wife

Report summary

Children's Services: Family and friends carers

Mr X complains that the Council led him to expect that when he and his wife became Special Guardians it would continue to provide the same amount of financial support they received as foster carers. Then over two years later it unfairly reduced the allowances.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council has offered a significant remedy which will restore Mr and Mrs X to the financial position they would have been in if the Council had not been at fault. It has offered to:

- pay the allowance at the rate of the foster carer allowance minus benefits until the children reach the age of 18, as set out in the original Special Guardianship Support Plan; and
- backdate the payments to when they were reduced.

It has also offered to pay them £250 to recognise the time and trouble involved in pursuing their complaint.

We welcome this offer. In addition, the Council has agreed to our recommendations to:

- pay Mr and Mrs X a further £250 to recognise the anxiety and distress caused by its actions;
- tell us what steps it will take to brief relevant staff on the legal and policy requirements on Special Guardianship. In particular it should ensure that:
 - proposed Special Guardianship Support Plans make clear the Council's intentions regarding any conditions to be placed on financial support;
 - it discusses Support Plans with prospective Special Guardians in a timely way, giving them 28 days to comment; and
 - it fully explains the financial implications to foster carers who wish to become Special Guardians.
- tell us how it plans to improve record keeping so it has evidence that prospective Special Guardians can make fully informed decisions before taking on the role.

The complaint

1. Mr X complains that the Council unfairly reduced the allowances paid to him and his wife as Special Guardians without telling him this would happen. He says when the Special Guardianship Order was made in 2014 for two children they were looking after, they understood the Council would continue to pay the allowance at the rate they had received as foster carers. Then in December 2016 the Council applied a means test, reduced the allowance and insisted they claim welfare benefits.

Legal and administrative background

The Ombudsman's role and powers

2. 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*)
3. 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. The 12-month period runs from when the person realises they have been affected by something the council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)
4. The 12-month rule does not apply in this case. Mr X complained to us within 12 months of the Council's decision in December 2016. It was only then that he had cause to complain about earlier events. We have therefore been able to investigate events dating back to 2013.

Special Guardianship Orders and Allowances

5. A Special Guardianship Order (SGO), granted by a court, gives the Special Guardian parental responsibility for a child who is not their own. It does not entirely remove the parental responsibility of the birth parent but limits it.
6. The Special Guardianship Regulations 2005 (amended in 2016) and the *Special Guardianship Statutory Guidance* set out the arrangements for financial and other support for Special Guardians.
7. Financial support is only payable in certain circumstances including where:
 - the council considers it is necessary to ensure that the Special Guardian can look after the child; and
 - the council considers it is appropriate to contribute to the legal costs of making an SGO.
8. Where the Special Guardian was previously the child's foster carer, the council can continue to pay the fostering allowance at the same rate they received when fostering. This applies for a transitional period of two years, or longer if it considers it appropriate. The aim is to give the family time to adjust to their new circumstances.
9. Where a council carries out an assessment of a Special Guardian's need for financial support it must take account of:

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- other benefits available to the Special Guardian or child;
 - the Special Guardian's financial resources, including any tax credit or benefit available if the child lived with them;
 - their income and outgoings; and
 - the financial needs and resources of the child.

This is known as means testing.

10. The Statutory Guidance says financial support paid under these Regulations cannot duplicate any other payment available to the Special Guardian. So it is important for councils to ensure Special Guardians are aware of and claiming any benefits and tax credits they are entitled to.
11. The Guidance says in determining the amount of ongoing financial support (sometimes referred to as Special Guardianship Allowance), a council should "have regard to" the amount of fostering allowance which would have been payable if the child were fostered. Any means test should use this maximum payment as a basis for the calculation. As foster carers cannot receive child benefit and child tax credits, councils usually take off an amount from the fostering allowance when calculating the maximum available allowance before means testing.
12. Councils must review the financial support they pay the Special Guardian every year and when there is a relevant change in their or the child's circumstances. If as a result of a review the council proposes to reduce or end financial support it must allow the Special Guardian to make representations.
13. The Guidance suggests that when carrying out a means test, councils may wish to use the non-statutory Government guidance, the '*Standardised Means Test Model for Adoption and Special Guardianship Financial Support*'.
14. The suggested Standardised Means Test Model involves calculating the family's income and then discounting 20% of that income.
15. After deciding to provide support services, councils must give notice of the decision to the Special Guardian, including reasons for it. Where it is to provide financial support, the notice must contain information about:
 - the method used to decide the amount of financial support;
 - the method of payment, frequency, period it covers and when it will begin;
 - whether it is subject to conditions;
 - the arrangement and procedure for review, variation and termination; and
 - the council's and Special Guardian's respective responsibilities.
16. Councils must prepare a Special Guardian Support Plan, to be kept under review. The Plan should set out the services to be provided, the objectives, the timescales for provision, procedures for review and who will monitor the provision of the services in the Plan. The Plan should be written in a way that everybody affected can understand. Councils must share a draft of the Plan with the Special Guardian and must consider the Special Guardian's representations before they finalise the Plan. They must also consult the Special Guardian about any revision of the Plan.

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17. The Council's '*Children's Services Procedures Manual*' includes the key legal provisions set out above. It also says the social worker must send the proposed Support Plan to the prospective Special Guardian allowing them 28 days to make representations.
 18. The Council's '*Process of Calculating the level of Special Guardianship Order Allowance*' says:
 - the Council will carry out a financial assessment to decide the level of financial support provided;
 - the maximum amount paid is equivalent to standard fostering allowance minus child benefit; and
 - it is the responsibility of the carers to claim child benefit, which can be paid as well as the Special Guardianship Order Allowance.
 19. The Council uses the Standardised Means Test Model recommended.

How we considered this complaint

20. We have produced this report after examining the Council's records, speaking to Mr X by telephone and considering information provided by him and the Council.
21. 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.
22. 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.

What we found

What happened

23. Mr and Mrs X were foster carers for a private fostering agency. Mrs X also worked part-time outside the home on a self-employed basis. Mr X gave up work when he became a foster carer. In 2012, when they had been fostering for several years, the Council placed two young siblings with them. The children were under Interim Care Orders, and the long-term plan for them changed several times. In October 2013, the Council started considering placing the children with Mr and Mrs X long-term under a Special Guardianship Order.
24. Mr X says when the social worker discussed this possibility with them, they said as they were professional foster carers they would not wish to become Special Guardians if it meant a loss of income. At the time they were receiving foster care payments of around £300 a week for each child. Mr X says the Council told him Special Guardianship Allowances were means tested and he replied that they would not want to undertake an SGO on those terms. There are no records of any such discussions with the social worker. There are records of emails between Mr and Mrs X and their supervising social worker from the agency. The supervising social worker said the Council "had been made aware" they were interested in becoming Special Guardians but it needed to be financially viable for them.
25. Once it became clear it would no longer be possible to return the children to their mother, the Council decided to seek a full Care Order and an SGO for

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- Mr and Mrs X. As part of the process the Care Management Team Manager carried out an SGO assessment with Mr and Mrs X during a visit in February 2014. The record of the visit contains no notes of any discussion with Mr and Mrs X or any detail of information provided to them. Under 'visit notes' it says "added late from notes whilst preparing for closure. This visit was to undertake the SGO assessment and see report for details". The Council agreed to pay for a consultation with a solicitor for Mr and Mrs X.
26. Minutes of Looked After Child review meetings in March and April 2014 say Mr and Mrs X agreed to become Special Guardians and that a Support Plan had been drawn up. But they do not record what was discussed or what information was provided.
 27. On 9 April 2014 as part of the care proceedings the Council filed its documents with the court, including an SGO Report. It said it had prepared an SGO Support Plan but needed to discuss this with the prospective Special Guardians. The hearing was scheduled for 6 May 2014.
 28. Mr and Mrs X's solicitor wrote to the Council on 11 April 2014, with a copy to Mr and Mrs X. He said he had had some discussions with them and would meet them and *"advise them in general terms regarding the nature of an SGO and then consider with them the specifics of this in the light of the support plan provided"*. He asked the Council to confirm his understanding that *"there is a commitment to provide financial support at the current level (minus state benefits) until the children reach 18"*. He said he understood the case was currently going through the courts and would conclude at the beginning of May. He asked the Council to send him the SGO Report and Support Plan as soon as possible. The solicitor told Mr and Mrs X he would contact them once he had heard back from the Council.
 29. The Team Manager responded by email on 1 May 2014, after being prompted by the Council's solicitor. The Team Manager apologised for his "slow response" and said he was attaching a copy of the SGO Support Plan. He said he hoped this would address the points the solicitor had raised in his letter. He said Mr and Mrs X would receive a copy the following morning. It is not clear whether the Support Plan was attached at this point.
 30. The Council says it delivered the SGO Support Plan to Mr and Mrs X's home the following day. However there is a note on file saying there was a letter box fastened to the wall and it was not clear whether the Support Plan was posted into it.
 31. The court hearing took place on 5 May 2014. The court granted the SGO and approved the Support Plan. Mr and Mrs X did not attend court and were not represented. The Council says they were not party to the proceedings because "as far as is apparent from the records" they agreed to the SGO being made.
 32. In the section on financial support, the Support Plan set out the current rate of fostering allowance Mr and Mrs X were receiving and said:

"It is requested that the Local Authority should pay the current carers allowance minus child benefit for the children and any working tax credits."
 33. The Support Plan said any allowances would be paid until the children reached the age of 18 unless certain circumstances changed, for example they finished full-time education or started working.

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34. The day after the hearing, on 6 May 2014, Mr X telephoned the Council asking for a copy of the SGO to be sent to his solicitor as he said he had not seen it. There is a copy on the records of an email from the Team Manager to the Council's solicitor on the same day with a copy of the Support Plan. The Council's solicitor sent it to Mr and Mrs X's solicitor saying it was a copy of the amended Plan that had been submitted to the court.
 35. When Mr X's solicitor sent an email to the Council on 7 May asking if the proceedings had concluded, the Council confirmed they had and also said he should have received a copy of the Support Plan. Mr X's solicitor replied that he had received it "but after the event I'm afraid".
 36. Mr and Mrs X started receiving the Special Guardianship Allowance in May 2014 at the same rate as their fostering allowance, with no deductions for child benefit or tax credits.
 37. About a month later Mr X contacted the Council to ask for a copy of the SGO so he could claim working tax credits. He did not make a claim.
 38. In August 2015 the Council decided to review the financial support provided to Mr and Mrs X. This may have been prompted by a request from Mr and Mrs X relating to nursery fees. Or it may have been because shortly before this the Council had decided there was no need for further social care involvement with the children and the case would transfer to the SGO support worker.
 39. The Council carried out a financial assessment based on information Mr and Mrs X provided about their income. This showed that Mrs X was working part-time and that neither of them were claiming any benefits.
 40. The Council wrote to Mr and Mrs X in December 2015 to tell them the outcome. It referred to a telephone conversation with them about the SGO Allowance that morning. There are no records of the call. The letter explained that for the next four weeks the Council would continue paying the allowances for both children at the same rate they had been receiving. It would then be reviewed. The payments would then continue at the same level on the condition that Mr and Mrs X provided evidence they had claimed any benefits they were entitled to, including child benefit and child tax credits. The letter referred to the SGO Support Plan the Council had on file which asked it to pay the allowance minus child benefit and any tax credits they received. It ended by saying if they did not provide the required evidence promptly it would result in the Council stopping the allowance while the issue was resolved.
 41. In early January 2016 Mr X discussed the question of financial support with the Council. He said he and his wife had wanted to claim the SGO Allowance and child benefit only and had not been told they would need to claim working tax credits. The Council's record of the call says "*we discussed the allowance being means tested and needing to be reviewed annually. Mr [X] clearly had not been aware of this and thought they would receive the fostering allowance and child benefit until the children reached 18*". The officer told Mr X that as the allowance is means tested he and his wife would need to tell the Council if their income changed.
 42. Mr and Mrs X did not claim the benefits as advised but the Council did not reduce the financial support.
 43. In December 2016 the Council carried out another financial assessment. The records show the Council applied the model means test to the assessment. It

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- decided to reduce the allowance “as an interim measure as Mr and Mrs [X] have made no effort to apply for Working Tax Credit”.
44. The Council wrote to Mr and Mrs X in January 2017 to tell them the outcome. It said it had reduced the allowances by deducting the amount of child benefit they were entitled to for each child. It told them they were required to claim child benefit and child tax credit or working tax credit. It referred to the SGO Support Plan which said these benefits would be deducted from the allowance. The Council asked them to provide evidence of their claims and said it would review the allowances again at the end of March 2017. The Council reduced the weekly payments by over £150 a week per child.
45. Mr and Mrs X discussed the matter with the Council over the telephone. Mr X said they had been told the allowance would not change and they were not expected to claim child tax credit or working tax credit.
46. In March 2017 Mr X contacted the Council again to say he and Mrs X had applied for tax credits. They were waiting for a final decision but believed they had been refused. The Council’s record of the call notes Mr X said he now understood they were expected to claim the benefits but that no-one had explained this to them at the time.
47. At the end of April 2017 the Council reviewed the SGO Support Plan. The revised Plan said:
- “[Mr and Mrs X] currently receive a means tested Special Guardianship Allowance that is reviewed annually”;
 - they “also receive Child Benefit and Tax Credits”; and
 - the allowance will be paid until [each child] is 18 years old, “subject to the means tested annual reviews” and the other conditions relating to the circumstances of the child.
48. Mr X contacted the Council. He said he felt he and his wife had been bullied into taking the SGO and had refused to sign the original Support Plan as they did not agree with it. He said they were now struggling financially. He confirmed they were now receiving tax credits but said they had never wanted to apply for benefits. However he expressed how happy they were to be looking after the children and how well the children were doing.
49. In October 2017 Mr X made a complaint to the Council about the reduction in support. He said he had told the Council during the initial discussion about becoming a Special Guardian that he and his wife would not wish to do so if it meant a loss of income. He said they went to see a solicitor and believed from that point on their conditions had been met. He said he now knew the SGO was made without meeting their conditions and he would never have agreed if he had realised the allowance would be means tested.
50. In response to the complaint the Council said it was national practice for SGO Allowances to be mean tested, and Special Guardians are expected to claim benefits. It confirmed the Council uses the national model of means testing recommended by the Government. It said Mr and Mrs X had the benefit of legal advice at the time and it referred to their requests for copies of the SGO so they could claim working tax credit in June 2014. The Council did not consider it was at fault.
51. Mr X replied in December 2017. He said he and Mrs X had only agreed to become Special Guardians if they continued to receive the same level of

financial support as they had as foster carers and they would be fully represented legally in court. He said they were now asking for legal advice to draw up a 'proper agreement' funded by the Council which would reinstate the allowances to the original amount. He wanted a refund of all sums deducted.

52. The Council declined to investigate further saying the events occurred too long ago for a meaningful investigation. It advised Mr X to contact us if he was not happy with the response.
53. In January 2018 the Council reduced the allowances again following a financial assessment. The letter to Mr and Mrs X explained that the allowances had been calculated according to the standardised means test model. It explained how the means test works and said the allowance should be reassessed annually.

Analysis and Conclusions

54. Mr X complains that the Council led him to expect he would continue to receive financial support at the same rate as when he was an agency foster carer. Then more than two and a half years after the court approved him and his wife as Special Guardians, the Council reduced their allowance and expected them to claim welfare benefits.
55. Councils are entitled to means test Special Guardianship Allowances and to expect Special Guardians to claim benefits they are entitled to. For former foster carers they may continue to pay the allowances at the foster care allowance rate for a transitional period of two years, or longer if they consider it necessary. But the law, statutory guidance and the Council's own policy requires it to provide detailed information to prospective Special Guardians about the proposed financial support before they take on such a commitment. This was particularly important in this case because it was the Council who approached Mr and Mrs X to take on the role, and they were not party to the proceedings and so were not present or represented in court. It was also important because as former foster carers they depended on the non-means tested fostering allowance. As Mrs X had part-time earnings as well, the couple would be affected by the means test.
56. There is no evidence in this case that the Council properly explained to Mr and Mrs X the financial implications of taking on an SGO when it asked them to do so. The Council's records are very sparse. There are no records of any discussions with Mr and Mrs X about the question of financial support before they agreed to take on the role. The Council at first said it would have expected the solicitor they consulted to explain the position to them. However there is evidence that right up until the date of the court hearing the solicitor was trying to establish with the Council what its proposed SGO Support Plan was. It is not clear whether Mr and Mrs X or their solicitor received a copy of the Support Plan a few days before the hearing or the day after. Some of the documents indicate that it was not until after the hearing had taken place and the SGO was granted. Either way the Council did not consult them or give them 28 days to make representations as it should have done.
57. In any event the Support Plan submitted to the court did not say the SGO Allowance would be subject to a means test and an annual review. It did say Mr and Mrs X would be expected to claim welfare benefits and these would be deducted from the allowance paid at their current rate. We consider that Mr and Mrs X could reasonably have been expected to realise they would need to claim benefits. The letter the solicitor copied to them asked the Council to

confirm they would receive financial support at their current level “minus state benefits”.

58. However there is nothing to show the Council told them it would reduce the allowance in future or apply any other wider means test. There is no evidence at the time the SGO was granted and the Support Plan approved that the Council had any plans to do so. The review and financial assessment in December 2015 appears to have been triggered by a change in case management.
59. The Council continued to pay the allowance at the same rate until after the next review in December 2016, despite saying it would reduce it. So Mr and Mrs X continued to expect their income would not be affected.
60. When the Council then reduced the financial support in January 2017 it told Mr and Mrs X it was simply deducting an amount equivalent to child benefit and working tax credits. But this was not the case. The amount of the reduction indicates that the Council had applied the full means test.
61. The Council did not consult Mr and Mrs X when it revised the Support Plan in April 2017.
62. There was then a further reduction in support in January 2018 following the next annual review. This was the first time the Council explained how the full means test worked.
63. We find that the Council was at fault as follows.
 - It failed to explain the financial implications to Mr and Mrs X of changing their status from foster carers to Special Guardians to allow them to make a fully informed decision.
 - It failed to consult them on the proposed Support Plan and give them enough time to comment.
 - It reduced their allowance in January 2017 contrary to the agreed Support Plan.
 - It then revised the Support Plan without consulting them properly.
 - It did not properly explain its decisions to reduce the allowance or how it was calculated.
 - Its record keeping was inadequate.
64. We published a Focus Report [‘Firm foundations: council support and advice for special guardians’](#) in May 2018. This identified some key recommendations based on learning from our investigations. These include:
 - give clear unambiguous advice to people who are considering becoming Special Guardians;
 - be as clear as possible about the support that might be available and how the council will assess the applicant’s support needs;
 - back up verbal advice and guidance in writing wherever possible, particularly where this may have long term consequences;
 - keep clear and transparent records of contact with Special Guardians;
 - make sure support plans are shared, discussed and agreed with Special Guardians and this is well documented; and

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- set out the approach to calculating Special Guardianship Allowance and explain this at the earliest stage possible.
65. Our investigation has found that the Council failed to meet these standards in this case.

Injustice

66. The Council accepts that Mr and Mrs X have provided the children with stability and a successful placement allowing them to thrive. Mr and Mrs X are happy to be caring for the children and would not wish to jeopardise the placement. However it is a big commitment to take on the parental responsibility of two young children until they reach adulthood. We have no reason to doubt that Mr and Mrs X would not have agreed to take on the role of Special Guardians had they understood the potential long-term effect on their income. They had been professional foster carers for many years and relied on that income. As Mrs X works part-time, the means test had a significant effect on their finances. The Council's decision to reduce the financial support so significantly has caused them distress and placed them in financial difficulty.

Council's offer

67. In the course of our investigation the Council reviewed its records and changed its earlier position. It accepted that the original Special Guardianship Support Plan did not contain a reference to annual means testing. It said the document was drafted incorrectly but accepted that it reflects the terms on which Mr and Mrs X agreed to become Special Guardians. Therefore it said it was prepared to honour the terms of the original Support Plan.
68. It has written to Mr and Mrs X to say it will restore the financial support to the level of fostering allowance minus benefits. This will apply until the children turn 18 or one of the changes in circumstances set out in the Support Plan occurs. It has now restored the payments and backdated them to when they were reduced. It also apologised to them and offered to pay them £250 to recognise their time and trouble in pursuing their complaint.

Recommendations

69. It is to the Council's credit that it has recognised it was at fault and offered a remedy. We welcome its offer to apologise to Mr and Mrs X, restore their previous allowances and refund payments they have lost. This is a suitable way to restore Mr and Mrs X to the financial position they would have been in if the Council had not been at fault.
70. We also recommend that as well as paying Mr and Mrs X £250 for their time and trouble in pursuing their complaint, the Council should pay them a further £250 to recognise the distress and anxiety they experienced.
71. We recommend that the Council demonstrate the lessons learned from this complaint. Its policy already sets out good practice. It should now tell us what steps it will take to brief relevant staff on the legal and policy requirements on Special Guardianship. In particular it should ensure that:
- proposed SGO Support Plans make clear the Council's intentions regarding any conditions to be placed on financial support;
 - it discusses the Support Plan with prospective Special Guardians in a timely way, giving them 28 days to comment; and

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- it fully explains the financial implications to foster carers who wish to become Special Guardians.
72. The Council should also tell us how it plans to improve record keeping so it has evidence that prospective Special Guardians can make fully informed decisions before taking on the role.
 73. The Council has agreed to our recommendations.
 74. 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*)

Decision

75. We have completed our investigation into this complaint. We have found fault causing injustice to Mr and Mrs X. The Council should take the action identified in paragraphs 70-72 which, combined with the action it has already taken, will remedy that injustice.