

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

**Investigation into a complaint against
Medway Council
(reference number: 17 015 628)**

13 March 2019

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

Mrs B	The complainant
C	Her younger daughter
D	Her elder daughter

Report summary

School transport

Mrs B complained to us in 2016 about the Council's decision to refuse her younger daughter, C, home to school transport to the secondary school that she attends (reference: [16 008 920](#)).

We found that the Council's policy did not comply with the *Home to school travel and transport guidance*, and it should have offered C home to school transport.

The Council agreed to:

- provide home to school transport for C to her present school from the date of our decision;
- reimburse Mrs B for the actual home to school transport costs she incurred for C from September 2016 (up to a maximum of £700); and
- maintain its current *Home to School Transport Policy* for the present but review it within three months in light of our guidance.

Mrs B complains that the Council has failed to carry out the agreed actions.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy Mrs B's injustice, we recommend the Council:

- continue to provide home to school transport for C to her present school;
- reimburse Mrs B for the actual home to school transport costs she incurred for C for 2016/17 and 2017/18;
- pay Mrs B £100 as a remedy for the injustice caused by the delay in undertaking the agreed settlement;
- pay Mrs B interest based on the increase in the Retail Price Index on the transport costs incurred for 2016/17 from the decision date on complaint reference 16 008 920, and for 2017/18 based on the dates that Mrs B made payments for school transport; and
- amend its *Home to School Transport Policy* to take into consideration the availability of places where the applicant applied for the nearest school at the time of the original admission application (regardless of preference rank).

The complaint

1. Mrs B complained to us in 2016 about the Council's decision to refuse her younger daughter, C, home to school transport to the secondary school that she attends (reference: 16 008 920).
2. We found that the Council's policy did not comply with the *Home to school travel and transport guidance*, and it should have offered C home to school transport.
3. The Council agreed to:
 - provide home to school transport for C from the date of our decision;
 - reimburse Mrs B for the actual home to school transport costs she incurred for C from September 2016 (up to a maximum of £700); and
 - maintain its current *Home to School Transport Policy* for the present but review it within three months in light of our guidance on the matter.
4. Mrs B complains that the Council has failed to carry out the agreed actions.

Legal and administrative background

The Ombudsman's role and powers

5. 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*)

Legal background

6. The Department for Education issued *Home to School Travel and Transport Guidance* (the statutory guidance) in July 2014. (*The Education Act 1996 sections 508 and 509, and part 6 of the Education and Inspections Act 2006*) The statutory guidance is used alongside the *School Admissions Code*, and states that:

"This is statutory guidance from the Department for Education. This means local authorities are under a duty to have regard to it when carrying out their duties in relation to home to school travel and transport, and sustainable travel."

7. Councils are required to make travel arrangements and provide free transport for "*eligible children*" of compulsory school age to attend their nearest suitable school. A child is eligible where the nearest suitable school is more than two miles from his or her home if the child is aged under eight, and three miles if aged between eight and sixteen.
8. The statutory guidance sets out the need for councils to take into account the availability of places when considering the nearest suitable school. It says:

"[the] nearest suitable school... is... taken to mean the nearest qualifying school with places available."

"At the point when transport eligibility is considered, the prospect of being able to secure a place in an alternative (usually nearer) school must be a real one. For most cases this will be during the normal school admissions round when places are allocated."

The Council's Home to School Transport Policy

9. The main relevant points of the Council's policy are summarised below.
- "The school must be deemed to be the nearest qualifying school to the home address... and... the child must be resident in [the borough]."*
- "The definition of the nearest qualifying school is: the geographically nearest school to the pupil's home address that is suitable to the pupil's age. For secondary age [the Council] also takes into account whether the child is of selective (grammar) ability or non-selective (non-grammar) ability."*
10. In relation to school preferences, the policy says:
- "For a child to be considered for home to school transport assistance when the school attended is not deemed the nearest qualifying school, parent/carers need to ensure that the nearest qualifying school has been named on the school application as a higher preference than the school being attended.*
- If the nearest qualifying school has not been applied for the child will not be eligible to (sic) the school attended even if it is over the minimum eligible distance.*
 - If the nearest qualifying school has been applied for as the highest preference, but has not been offered, then home to school transport can be considered to the next nearest qualifying school if it has been listed as the next highest preference on the school application. This principle and the minimum eligible distance applies for further preferences."*
11. The Council has explained that, in accordance with section 86 of *the School Standards and Framework Act 1998*, parental preference is a material consideration. It says its policy provides parents with a choice of applying first for the nearest qualifying school if transport is an important factor in their decision.

How we considered this complaint

12. We produced this report after examining the relevant documents and correspondence from the Council and the complainant. We have had discussions with the complainant and the Council, made enquiries of the Council and considered the comments it provided in response.
13. We have given the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

14. In 2015, Mrs B applied for a Year 7 place for her daughter, C. She put School 1 as her first preference on the application and School 2 second, and was awarded a place at School 1.
15. C's elder sister, D, had previously attended School 1, which is over three miles from the family home and was previously considered the nearest qualifying school. So, D had received transport to School 1. However, the Council had since changed its route measurement. The new distance measurements were 3.56 miles for School 1 and 3.55 miles for School 2, so the Council no longer regarded School 1 as the nearest qualifying school.
16. The Council pre-assesses all Year 6 children due to start secondary school based on the school offered on national offer day and then automatically writes to

-
- parents to tell them whether they qualify for home to school transport. It told Mrs B that C was not eligible for transport to School 1 as it was not the nearest qualifying school.
17. Mrs B requested the decision be reviewed by a senior officer, and then by the Council's School Transport and Curriculum Appeals Committee, but her appeal was not upheld.
 18. Mrs B then complained to us about several aspects of the Council's handling of her appeal. These included that:
 - the difference between distances to the two schools was less than the mapping margin of error;
 - the Council had sent the route map late, so Mrs B had not been able to challenge the safety of the route; and
 - the Council had asked her inappropriate questions about her employment and earnings.
 19. We did not find that these issues either represented fault or had affected Mrs B's appeal, though the Council agreed to change its policy to measure distances more accurately.
 20. However, we considered that the Council was wrong to consider School 2 as the "nearest suitable school".
 21. The Council explained how it takes the availability of a place into account:

"...following national offer day the Council pre-assesses Year 6 children based on the school offered on national offer day to determine eligibility for home to school transport... If no place is available at the nearest qualifying school then home to school transport is provided to the next nearest qualifying school."

"The only caveat to this is that the Council does also take account of the order of parental preference in the school application. The Council therefore does consider the availability of places."
 22. So the Council's policy does not take into account whether a place was available at the nearest qualifying school unless applicants put the nearest qualifying school as first preference. We found that the Council's policy does not comply with the statutory guidance.
 23. In C's case, she lives further from School 2 than the last successful applicant, so there would have been no place available for C at School 2 on national offer day, even if she had put School 2 as first preference. Instead, C was offered a place at School 1, which was the nearest qualifying school with places available, i.e. "the nearest suitable school". We therefore found that the Council should have offered C transport to School 1.
 24. The Council agreed to:
 - provide home to school transport for C to her present school from the date of our decision;
 - reimburse Mrs B for the actual home to school transport costs she incurred for C from September 2016 (up to a maximum of £700); and
 - maintain its current *Home to School Transport Policy* for the present but review it within three months in light of our guidance.
-

-
25. We contacted the Council in December 2017 to check whether it had complied with the agreed recommendations.
 26. The Council explained that, before implementing the agreed recommendations, it had shared our decision with members, who had requested that external legal advice be sought. Based on its legal advice, it considers its policy to be lawful.
 27. The Council later contacted the Department for Education (DfE) to seek further clarification, and considers that its correspondence with the DfE confirms its view. It agreed to add to its policy that it would consider exercising discretion in cases where parents had not put the nearest school first, if they had first researched availability and found that a place at the nearest school was unlikely to be available.
 28. However, the Council considers that, if parents make an informed choice to apply first for another school, then this may be taken to indicate that transport is not an important factor in their choice of school. It does not consider it to be fair that parents who have not put the nearest qualifying school first should be able to secure travel assistance just because a place at their nearest qualifying school was not available at the point of allocation for that particular admission year.
 29. It says if it were to amend its policy to take into account the availability of places where parents have not put the nearest qualifying school first, this “*would create a grey area open to abuse*”. But it accepts that there may be occasions “*where there is genuinely no real prospect of a child being admitted to their nearest school based on the information available at the time of application and this may be a reason for the family to list another more distant school as the first preference*”. The Council is therefore willing to consider changing its policy to review such cases on the basis of their individual circumstances.
 30. The Council considers that by reviewing its policy it has complied with our recommendation.
 31. There were also further discussions over the route used and the availability of a footpath. The Council rechecked the route and established that it had correctly assessed the distances in June 2016, so C was not then attending the nearest school. However, the route assessments subsequently changed in September 2017 (because of a footpath) and, as a result, the school that C is attending became the nearest school. In consequence, the Council offered to pay costs of £620 for 2017/18, and has provided a bus pass for C for 2018/19.

Conclusion

Policy

32. We do not consider there is any legal basis for the Council to require a parent to put the nearest school as a first preference to qualify for free school transport. If a parent chooses to apply in first place for a school beyond the statutory walking distance that is not their nearest school, the Council should not automatically refuse transport. This approach takes no account of whether the child would have had a real prospect of being offered a place at the nearest qualifying school and therefore whether that school is “*suitable*”, in accordance with the statutory guidance. If there would be no place available at the nearest school, then it could not be a suitable school. Whether parents have made an informed choice to apply for a school that is not the nearest qualifying school has no bearing on this.

-
33. We do not therefore consider that the changes the Council has proposed to its policy go far enough. We consider that the Council should revise its policy to take into account the availability of places.
34. The Council has suggested that, as it has undertaken a review of its policy, it has complied with our recommendation. We do not agree.
35. The Oxford English Dictionary defines the verb “review” as “Assess (something) formally with the intention of instituting change if necessary”. The Council was aware we had asked it to review its policy because we did not consider the policy took the availability of places into account and so did not comply with the statutory guidance. The purpose of that recommendation was therefore that the Council should make the changes necessary to comply with the statutory guidance. We do not therefore consider that the Council has complied with our recommendations in respect of the review of its policy.

Financial remedy

36. The Council has agreed to pay C’s transport costs for 2017/18 and has provided a bus pass for 2018/19 because School 1 is now considered the nearest school. It has also indicated its willingness to consider paying C’s transport costs back to 2016/17, if we accept the Council’s suggested policy changes.
37. We appreciate the Council’s attempt to resolve the complaint, and the Council is entitled to provide transport on a goodwill or discretionary basis. But we consider that the Council should be paying C’s transport costs from September 2016 because she is attending the school that was the nearest suitable school at the time that places were allocated.
38. We do not therefore consider that the proposed financial remedy is satisfactory because it does not cover the full period in question, nor does the Council acknowledge the underlying fault.

Recommendations

39. To remedy Mrs B’s injustice, we recommend that the Council:
- continue to provide home to school transport for C to her present school from the date of this report;
 - reimburse Mrs B for the actual home to school transport costs she incurred for C from September 2016;
 - pay Mrs B £100 as a remedy for the injustice caused by the delay in undertaking the agreed settlement;
 - pay Mrs B interest based on the increase in the Retail Price Index on the transport costs incurred for 2016/17 from the decision date on complaint reference 16 008 920, and for 2017/18 based on the dates that Mrs B made payments for school transport; and
 - amend its Home to School Transport Policy to take into consideration the availability of places where the applicant applied for the nearest school at the time of the original admission application (regardless of preference rank).
40. The Council must consider the report and confirm the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet, or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

-
41. In view of the “*purdah*” period ahead of the local elections, we have agreed to extend the period for the Council to consider the report from the usual three months until the end of July 2019, provided that no children are disadvantaged in the meantime.

Decision

42. We have completed our investigation into this complaint by issuing a report. We have found evidence of fault causing injustice. We have recommended action to remedy the injustice caused.