

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

**Investigation into a complaint against
West Sussex County Council
(reference number: 17 008 448)**

29 May 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 X	The complainant
Y	Her daughter
Officer B	Pupil Entitlement Investigating Officer

Report summary

Education Council: Attendance and Alternative Provision

We have written this Further Report because the Council has so far refused to comply with recommendations made in a report issued on 23 October 2018. The recommendations were made to remedy the injustice caused as a result of fault by the Council. The Council was given three months to respond to the report and provide evidence of compliance. The Council responded but refused to comply with the recommendations. We are therefore issuing a further report to highlight the continuing concerns about the Council's failure to fully acknowledge and remedy its faults.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council should consider the original report issued on 23 October 2018 in its final version, rather than the draft report, as well as this further report.

To remedy the injustice caused to Mrs X and her daughter, the Council should make the necessary arrangements to ensure full compliance with the recommendations set out in the original report and provide evidence of this without delay.

If it is minded not to comply with our recommendations, then this report must be considered by full Council in accordance with Section 31A(1A) of the Local Government Act 1974.

Introduction

1. Mrs X complained to us previously about the way the Council dealt with her daughter Y's education when she started refusing to go to school because of high levels of anxiety.
2. We investigated the complaint and found that the Council was at fault in the later stages of the period under investigation. We issued a report on 23 October 2018 explaining the basis of the findings of fault and making recommendations to remedy the injustice caused as a result. These were to:
 - apologise to Mrs X for not fully considering alternative approaches to ensuring an education for her daughter for a three-month period;
 - pay her £400 to recognise the loss of educational opportunity during this period, to be used for the benefit of Y's education;
 - remind relevant staff that the duty to provide alternative education under section 19 of the Education Act 1996 may arise for reasons other than exclusion and illness.
3. The Council was informed that under Section 31(2) of the 1974 Act, the report must be laid before the authority concerned. It was asked to arrange for the report to be considered at either full Council, Cabinet or another Committee with delegated authority and tell us, within three months of receiving it, the action it had taken or proposed to take.

Legal and administrative background

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. The Council must consider the report and confirm within three months the action it has taken or proposes to take. (*Local Government Act 1974, section 31(2), as amended*)
6. If we do not receive a response within the agreed time, or we are not satisfied with the action the Council takes or proposes to take, we shall issue a further report. (*Local Government Act 1974, section 31(2A)*)

How we considered this complaint

7. We produced this report after giving the Council the opportunity to provide evidence to demonstrate it had complied with the recommendations made in the previous report. The Council considered that report but decided not to comply with our recommendations.

Investigation

8. The original investigation into Mrs X's complaint found that while the Council was not at fault in deciding to start enforcement action against her for Y's non-attendance at school, or in advising her about the need to produce medical evidence, its approach to Y's education after she had been out of school for three months was flawed. We concluded that the Council was at fault from the end of

April 2017 in failing to consider the views of professionals involved that it was Y's high levels of anxiety that were preventing her from attending school. We found that the Council should not have advised the school not to send work home and should have considered a more flexible approach focussed on Y's educational needs. We concluded that had the Council done so, it might have considered the possibility of an alternative education package sooner. Full details of our report and our findings can be found [here](#).

9. The original report was issued on 23 October 2018. The Council was given three months to consider and respond to it and was asked to notify us by 6 November 2018 the arrangements it was making to do this.
10. The three-month period ended on 23 January 2019. We extended the deadline because we had wrongly advised the Council it ran from the date of publication of the report (12 December 2018) rather than the date of receipt.
11. The Council's Standards Committee considered our report on 4 March 2019. The report to the Committee from the Director of Law and Assurance said it attached a copy of our full report. It summarised our decision as that "the Council should have supplied alternative education despite no medical evidence having been provided; and recommended a financial remedy".
12. The Director's report said the Council's stance was that it did not accept the recommendation because:

"This would set an unhelpful precedent under which any school refuser would have to be supplied with alternative education, whatever the evidential justification, and the officers with service responsibility decided, on balance, not to accept the recommendation". (paragraph 1.3)

"If it were to accept the recommendation, this could be seen as setting a precedent which would have financial implications for the Service". (paragraph 3.1)

"There would be resource implications for the service should LGO investigation outcomes be implemented without consideration of their impact on Council resources as a relevant factor in deciding whether the actions recommended by the LGO report in any case be met. The specific resource implications would need to be considered on a case by case basis, dependent on their proportionate impact in the context of the action being recommended." (paragraph 3.2)

13. The Standards Committee formal decision was:

"That the Committee does not accept the Ombudsman's recommendations in this case, supports the County Council's stance of non-agreement to them and agrees that a Statement of Non-Compliance be issued."

14. The Council provided its response to us on 2 April 2019 as follows:

"The Council's Standards Committee took note and discussed the LGO report in full on 4th March. Having reflected on the findings and recommendations, the Committee were of the opinion that all appropriate actions were taken by the school and

the local authority to guide and offer support for the pupil and parents. Intervention and support did lead to improved attendance for a while before falling back again. Significant efforts were made to engage with the parent and to explain the need for supporting medical evidence from the GP or specialist if it was considered that the pupil was medically unfit to attend school. Once medical evidence was provided the local authority withdrew their legal action on attendance and put in place alternative provision.

“Councillors on the Standards Committee were of the view that the school and local authority had acted professionally and appropriately throughout and, should the recommendations have been accepted, this would have wrongly given the impression that the school and local authority had acted inappropriately. Should the recommendations be accepted, there was a concern that this would create a precedent in requiring schools and local authority to put in additional educational provision for students who did not attend school but without any medical evidence of exceptional need.”

Our comments

15. The Council says the Standards Committee considered the final report on the complaint. However, the documents it has provided show that in fact it considered the draft report. The Standards Committee did not therefore have the opportunity to consider our comments on the Council’s response to the draft report which was contained in the final report.
16. The Council’s final response is similar to the comments made on our draft decision statement and draft report. We have responded to these in the course of our investigation but will address them here so the Council can consider them again.
17. We do not agree with the Council’s position that to accept our recommendations would set a precedent under which the Council would have to offer alternative education to any school refuser regardless of the reason or the evidence provided. We regard this as a misrepresentation of our findings. We decide each case on its merits and this is not the conclusion we drew in this case. We did not find fault with the decision to refer the case for action for non-attendance, specifically because the family had not provided any medical evidence of the reason Y was not attending. We referred to the fact that Y’s school and the Council had advised Mrs X several times that she should seek medical evidence. We acknowledged that had she done so it is likely the issue of Y’s education would have been resolved earlier.
18. Our finding was that by the end of April 2017 when the Early Help/Family Network Forum considered the case, the Council should have considered taking a more flexible approach and a broader view of its duties under section 19 of the Education Act 1996 than it did. We found that the Council was at fault in failing to do so.
19. Clearly where a child cannot attend school for medical reasons the Council is entitled to expect medical evidence to be provided. However, the duty to provide alternative education under section 19 may arise for reasons other than illness.

By this time there was mounting evidence, including from the Youth Worker allocated to work with Y, that the reason Y was unable to attend school was her high levels of anxiety. She had previously been referred to the Child and Adolescent Mental Health Service and the Youth Emotional Support service, and her mother had tried to take her to the GP, but she had refused to engage. Even without a firm medical diagnosis our view is that the Council should have considered the views of other professionals about the reasons for her absence from school.

20. The Council also disagreed with our finding that it was at fault in intervening to advise the school not to send work home for Y, as agreed by the Forum. The Council said it did not apply pressure to the school. However, as we pointed out in our draft and final report, the Council itself provided evidence that it contacted the school after the Forum meeting to advise it not to do so. We do not dispute the Council's view that the school made significant efforts to offer support and engage Y in education. But if the Council considered it was the school's responsibility to provide education, rather than the Council's to make alternative provision, then it should not have advised the school not to comply with the plan agreed at the Forum. The school continued to refuse Mrs X's requests to send work home during the rest of the term. It seems likely this stance was influenced by the Council's. So Y missed out on the chance to have work sent home for a term.
21. The Council also said it would not encourage schools to offer to send work home when there is no evidence to suggest the child is unable to attend school. As already discussed, although Mrs X had not provided a letter from a GP, we do not agree that there was no evidence of her reasons for non-attendance.
22. In responding to our draft decision on the complaint the Council disagreed with our recommendations partly because it said alternative provision is a limited and very expensive resource which should not be provided without the evidence to support the referral. It said there are many children with anxieties and emotionally based school avoidance who are being successfully managed by schools without the need for alternative provision. Again, we do not dispute this. If a child is receiving suitable education through the school, section 19 would not be engaged. But in this case the child was not receiving any education and the Council stepped in to stop the school sending work home.
23. The Council objected to our statement in the draft report that it appeared to be focusing on the prosecution to the detriment of Y's education. Yet this view was based on the Council's own statement that sending work home would give mixed messages to the parent and potentially undermine the strength of any legal action taken against them. We therefore maintained our view in the final report that the Council took too restrictive an approach, which was not in keeping with Statutory guidance *'Ensuring a good education for children who cannot attend school because of health needs'*. This says that in considering alternative education, local authorities should not have inflexible policies which result in children going without suitable full-time education (or as much education as their health condition allows them to participate in). We considered that in this case the decision to rule out any possibility other than continuing with the prosecution until it received the medical evidence meant the Council lost sight of the primary interest of the child to receive a suitable education.

Conclusions

24. We are not satisfied with the Council's response to our report and so have issued this Further Report.
25. We find the Council's consideration of the original report was procedurally flawed in two respects:
 - It considered the draft report rather than the final report and
 - More importantly, its response suggests that it is, to a substantial extent, attempting to reject and dispute our findings, rather than our recommendations. This is not an option which is open to the Council outside of an application for judicial review of the original decision. (*R (on the application of Gallagher and another) v Basildon District Council [2010] EWHC 2824 (Admin)*).
26. The Council has not applied for judicial review of the original report and is now out of time to do so. The authority should therefore accept the Ombudsman's findings as the basis for its consideration of the recommendations. It has clearly failed to do that.
27. The Council's decision to reject the recommendations was based on flawed and irrational considerations:
 - Its response is clearly rooted in concerns about creating a precedent for future cases. There is in fact no system of binding precedent in the Ombudsman's work, and each case is considered on its unique facts and circumstances. The Council has therefore misdirected itself in rejecting these case-specific recommendations based on non-existent, future implications for other cases.
 - The Council cites 'resource implications' as a key consideration. Given the absence of any wider precedent, and the modest nature of the recommendations in this case, this is an irrational consideration. The resource implications in this case amount to just £400, plus a small amount of officer time to issue an apology and a reminder to staff about the law they must follow. This is negligible in terms of the authority's budget and is likely to be less than the administrative costs now arising from the Council disputing the decision.

Decision

28. The previous investigation into this complaint was completed and a report issued. That explained the faults that had occurred and the resulting injustice. We made recommendations to remedy that injustice. The Council has so far rejected those recommendations. This has led to this further report being issued.

Recommendations

29. The Council should consider the original report issued on 23 October 2018 in its final version, rather than the draft report, as well as this further report.
30. To remedy the injustice caused to Mrs X and her daughter, the Council should make the necessary arrangements to ensure full compliance with the recommendations set out in the original report and provide evidence of this without delay.
31. If it is minded not to comply with our recommendations, then this report must be considered by full Council in accordance with Section 31A(1A) of the Local Government Act 1974.