

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

**Investigation into a complaint against
East Sussex County Council
(reference number: 18 012 500)**

20 January 2020

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

Mr X – the complainant

Mrs X – the complainant's wife

Mr A – the complainant's son

Report summary

Education and Children services

Mr X complains about the Council's decision to provide home to college transport for his adult learner son, Mr A, for four days a week instead of five days. Mr X says the Council considered irrelevant information when it made its decision.

Finding

Fault found causing injustice and recommendations made

Recommendations

To remedy the injustice caused, we recommend the Council:

- Apologise to Mr and Mrs X for the fault identified.
- Pay Mr and Mrs X £300 in recognition of the uncertainty caused by the fault identified.
- Review the cases of young adults (19-25) who have an Education, Health and Care (EHC) plan naming an educational setting and who were refused transport at appeal in 2018 and 2019. The review will consider if others have been similarly affected by the fault identified in this report.
- Write to the young adults identified in its review (those affected by the fault identified in this report) and invite them to reapply for travel assistance (if still relevant) under its revised policy.
- Review its policy on post 16 (to 25) SEND travel (2019) and revise it to properly reflect the test set out in law. The policy should be clear that the Council has a statutory duty to provide transport to post-19 learners if it is considered 'necessary', not exceptional.
- Properly reflect in its revised policy the difference between the approaches the Council should be taking for young people aged 16-18 and those over 19.
- Make the finalised policy available on its website.

The complaint

1. Mr X complains about the Council's decision to provide home to college transport for his adult learner son, Mr A, for four days a week instead of five days. Mr A attends college five days a week and his college is named on his Education, Health and Care (EHC) plan. Mr X says the Council considered irrelevant information when it made its decision.

Legal and administrative background

The Ombudsman's role

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 may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)
4. Under our information sharing agreement, we will share this decision with the Office for Standards in Education, Children's Services and Skills (Ofsted).

Decision making

5. The Ombudsman's guidance 'Principles of good administrative practice' (2018) sets out the principles of good administration in decision making. These include:
 - Taking reasonable, timely decisions, based on all relevant considerations.
 - Following the law and taking the rights of those concerned into account.

Transport to education setting

6. Section 508F of the Education Act 1996 requires local authorities to make transport arrangements they consider "necessary" (or that the Secretary of State directs) to facilitate the attendance of relevant young adults at institutions where the local authority has secured the provision of education for the adult concerned. Relevant young adult means an adult who is under 25 years old for whom an EHC plan is maintained. An EHC plan is for children and young people between 0 and 25 years old in education, who have additional needs. The plan coordinates a child or young person's health and social care needs and sets out any additional support they might need. (*The Children and Families Act 2014, section 82*)
7. A council has a duty to secure the specified special educational provision in the EHC plan for the young adult. (*The Children and Families Act 2014, section 42*)
8. When a council finds it is 'necessary' to provide transport for the young adult under section 508F, then the transport must be provided and be free of charge (*Education Act 1996, section 508F(4)*).
9. If a council does not consider it 'necessary' to provide transport under section 508F it may still choose to pay some or all of the reasonable travel costs under either section 508F(8) or as social care provision under the Care Act 2014.
10. Under section 508G of the Education Act 1996 councils must set out information about the travel provision they have in place for relevant young learners so they and their families can make informed choices between institutions. The Special

Educational Needs and Disability (SEND) Code of Practice: 0 to 25 years (2014) requires councils to have clear policies about transport in their Local Offer.

11. A Local Offer sets out in one place information about provisions the local authority expects to be, and will be, available across education, health and social care for children and young people in their area who have special educational needs ('SEN') or are disabled. This includes those who do not have an EHC plan.
12. Statutory guidance 'Transport to education and training for people aged 16 and over' (2019) also highlights local authorities' duties under section 508F and 508G of the Education Act 1996. It notes that the overall intention of the adult transport duty is to ensure that those with the most severe disabilities with no other means of transportation can undertake further education and training after their 19th birthday to help them move towards more independent living.
13. The application of a transport policy in relation to a disabled young person engages the Equality Act 2010. Councils must have regard to the need to advance equality of opportunity to access education between persons with a disability and those without.
14. The Upper Tribunal (Administrative Appeals Chamber) has considered transport for post-19 learners with an EHC plan. The Tribunal commented that: *"the local authority has a duty to make transport arrangements for [a post 19 learner] if they consider that to be 'necessary' having regard to all the relevant circumstances. This is not a pure discretion. Although the question of what is necessary is a matter for them, in deciding that question they must exercise their judgment judiciously and in good faith. If they come to the conclusion that it is necessary, they must make the necessary arrangement and the transportation must be free of charge."* (*Staffordshire County Council v JM*, 2016] UKUT 246 (AAC))

Council's policy: Travel assistance for post-19 young people with special educational needs and disabilities (SEND) – August 2017

15. This policy was relevant at the time the Council considered Mr X's appeal. It sets out how the Council determines eligibility for travel assistance for students aged 19 and over.
16. It notes for those who begin an educational placement which starts on or after their 19th birthday, the home to school transport budget would rarely be used to support transport as it would be assumed the family (including wider family and social networks) would be responsible, and/or would be able to access relevant benefits.
17. The policy notes students with learning difficulties or disabilities, or their parents or carers, may be eligible for travel assistance in the most exceptional cases.
18. The policy sets out the Council will take the following factors into account to determine eligibility for assistance:
 - The student is unable to travel to their placement by public transport, either unaccompanied or accompanied by a responsible adult (specific and up to date evidence from relevant health and/or educational appropriate professionals supporting the student will be required).
 - The family does not have a suitable vehicle, which may include a Motability vehicle, for their transportation to school or college.
 - The length or complexity of the journey and whether parents or carers could arrange transport or act as a chaperone themselves. If parents/carers

(including wider family and social networks) are not available this should be fully explained in the application. It is unlikely that broader family caring responsibilities will be considered as exceptional circumstances.

- Other circumstances relevant to each case.

The Council's post-16 (to 25) SEND travel assistance policy – January 2019

19. The Council has introduced a new policy on travel assistance for students of sixth form age and above, who have SEND.
20. This policy notes that local authorities do not have a statutory duty to provide free travel support for young people of sixth form age and over. It notes that post 16 and post 19 transport is discretionary and that the Council will only assist with the most exceptional cases.
21. The policy also outlines the factors the Council will consider when determining eligibility for assistance. These factors include:
 - The nature of the journey for the student and family: whether the journey to education, whether by road, public transport or on foot, could be reasonably made if the student is accompanied.
 - The parent/carer/broader network: whether the student's family or broader network is reasonably able to transport or accompany the student.
 - Suitable vehicle or disability benefits: whether the family has a suitable vehicle, which may include a Motability vehicle.
22. The policy also notes that the following evidence may be required:
 - Recent evidence from a relevant health professional regarding a parent/carer's health, if this means that they are not able to accompany or transport their son or daughter themselves.
 - Evidence from the parent/carer's employer regarding their work commitments, to include working hours, days, times, location of work, and distance in miles from home to work and from the placement to work.
 - Written evidence to demonstrate other commitments, although broader caring responsibilities would not normally be considered as a reason why a parent would not be able to transport the student, as the family would be expected to find alternative solutions in most cases.

How we considered this complaint

23. We produced this report after examining relevant files and documents and speaking with Mr X.
24. We provided Mr X and the Council with a copy of the draft report and considered their comments.

What we found

Background

25. Mr A started a new course of education in September 2018, aged 19 years. Mr A is an adult learner. The relevant legislation surrounding his home to college transport requirements is the Education Act 1996, section 508F.
26. Mr A has a diagnosis of a moderate to severe learning disability. He has an EHC plan which names the college he currently attends.

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27. In the 2017/18 academic year, the Council provided Mr A with home to college transport for four days a week. Mr A's parents provided transport for the fifth day as their work commitments and schedule allowed it. The Council did not pay the travel costs incurred by Mr A's parents.

What happened

28. In June 2018 Mr and Mrs X applied for home to college transport for five days a week for Mr A for the 2018/2019 academic year. This was because Mrs X's work commitments now meant she could not take Mr A to college on the fifth day. Mr A's EHC plan specified he needed five days a week of education.
29. The Council refused to provide transport for the fifth day and asked Mr and Mrs X to send in a letter from Mrs X's employer detailing her work commitments for it to consider. The Council said the current discretionary offer for Mr A's home to college transport would remain at four days a week while it considered the matter. Mrs X sent the Council information from her employer which detailed her work commitments.
30. The Council also told Mr and Mrs X that all post 16 transport was discretionary and that local authorities need only offer discretionary transport to post 16s if it was judged that without the offer, the young person would have no other means to be able to get to their placement.
31. In September 2018, the Council considered the matter but declined the request as the panel felt it continued to be a reasonable expectation for Mr and Mrs X to make their own arrangements to provide transport for Mr A to get to college one day a week.
32. The Council said the decision was reached in line with the criteria outlined in the Council's post-19 transport policy 2017, namely that the expectation is for families to take responsibility for transport to college for someone in post-19 education. The Council gave Mr and Mrs X information on how to appeal the decision.
33. Mr and Mrs X appealed the Council's decision on the basis there was no duty on parents to accompany adult learners to their post-19 education placement. Mr and Mrs X also said they had no parental responsibility for Mr A and no legal obligation to ensure Mr A attended his college.
34. The Appeal Panel considered the Council's obligations under section 508(F) of the Education Act 1996 and noted Mr and Mrs X appealed on the following grounds:
- Mr A was not yet an independent traveller;
 - Mrs X was not able to provide transport one day a week;
 - there was no duty on the parents to provide transport assistance, and;
 - Mr and Mrs X's reliance on findings from a previous Ombudsman's report on a similar case.
35. The Appeal Panel decided it was not necessary to provide Mr A with an additional day of free transport.
36. The Council outlined that in deciding whether to offer further discretionary transport, the appeal panel considered the issues around Mr and Mrs X's work commitments. The panel noted both parents had flexible working arrangements which meant they could arrange Mr A's transport for the additional one day a week. The panel said this was a reasonable expectation of the parents. The panel

also suggested Mr and Mrs X could arrange and pay for someone else to take Mr A.

37. The Council also explained it had considered it necessary to offer Mr A four days of transport because of the family's work commitments. But, as the case was not exceptional, it was not prepared to exercise further discretion.

Analysis

Legal context

38. The law sets out a statutory duty on local authorities to provide free transport to relevant young adults aged 19 or over where they decide it is 'necessary'.
39. The law does not specify whether there is a duty for parents/carers to provide education transport for relevant young people aged 19 or over.
40. The Upper Tribunal set out the test of what transport arrangements might be necessary as being those "*having had regard to all the relevant circumstances*". The Council therefore has a qualified discretionary duty to provide transport.

The Council's policy

41. The relevant policy in place at the time of Mr X's appeal was the August 2017 policy.
42. The starting point for the policy should be the range of resources available to the young person to support them to travel to their education placement. However, the policy suggests the family will be expected to provide transport in practically all cases. In deciding on this basis, the Council appears to fetter its discretion. This is fault. This is because the Council should be considering each case on its own merits.
43. Further, the wrong test is set out in the policy. The policy states the test is whether the circumstances are 'exceptional', but the law says it is whether it is 'necessary' to provide transport. The two words have different meanings, but the law is very specific. This is fault.
44. The Council considered what was necessary but, given the faults in the policy's wording, we find the appeal was likely to have been affected by maladministration, and so was fundamentally flawed. By this we mean the Council would have had in mind the incorrect policy when it made its decision, and this may have influenced the decision.
45. The fault has caused Mr and Mrs X an injustice because there is uncertainty about what decision the Appeal Panel would have made, if it had been guided by an appropriate policy.
46. The Council implemented a new policy in January 2019. In addition to the faults outlined in paragraphs 43 and 44, the January 2019 policy also states that local authorities do not have a statutory duty to provide free travel support for young people of sixth form age and over. This is not accurate, because if the Council decides transport is 'necessary' it has a statutory duty to provide it free of charge for learners with an EHCP aged 19 and over. This is fault.
47. In response to my draft report, the Council disagreed with our findings. It said the Ombudsman had previously endorsed its policy and stated the policy was in line with the law. The Council said we have not explained why we have changed our mind.

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48. We do not dispute the fact we had previously stated the Council's policy was in line with the law. However, the previous decision does not set a precedent and further consideration of the policy has led us to change our view. We have set out our reasons for our decision in the above paragraphs.
49. The Council says it was entitled to take the view that travel support is only provided in the most exceptional cases. It says this is because 'necessity' is a high hurdle. But the tests of what might be considered 'exceptional' and what might be considered 'necessary' in any given situation, are clearly different. The Council's policy does not therefore accurately reflect what the law says, and our view remains that this is fault.
50. The Council says 'necessity' was the test applied, and this is supported by our findings at paragraph 35. This report does not intend to argue the Council applied the wrong test when it made its decision. Our view is that the wrong test is set out within the policy, and so there is uncertainty as to whether the Panel's decision was influenced by this when it made its decision within that policy's framework.
51. The Council says its policy does not make an assertion or statement that an assumption would be made that the family would provide transport in practically all cases.
52. The policy says "*...the home to school transport budget will rarely be used to support transport as it would be assumed the family would be responsible...*". The policy also says students may be eligible in the most exceptional cases. Therefore, our view remains that the wording of the policy can leave the reader with the impression the family will provide transport in practically all cases.
53. Finally, in relation to our recommendations, the Council says there were five appeals for the academic year 2018/2019 and seven appeals for 2019/2020. The Council says all but one of the young adults are still attending their college. The Council says the fact they are still attending clearly demonstrates that school transport is not necessary to facilitate their attendance. The Council says there is therefore no point in inviting them to reapply for travel assistance.
54. At this stage, we do not know how each young adult has been affected. For example, they may be missing certain days, arriving late or having to leave early, or incurring considerable expenses. Therefore, they may be suffering an injustice as a result of the Council's decision to refuse transport support. For this reason, our recommendation remains unchanged.

Recommended action

55. To remedy the injustice caused, we recommend the Council:
- Apologise to Mr and Mrs X for the fault identified.
 - Pay Mr and Mrs X £300 in recognition of the uncertainty caused by the fault identified.

Others potentially affected:

- Review the cases of young adults (19-25) who have an EHC plan naming an educational setting and who were refused transport at appeal in 2018 and 2019. The review will consider if others have been similarly affected by the fault identified in this report.

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- Write to the young adults identified in its review (those affected by the fault identified in this report) and invite them to reapply for travel assistance (if still relevant) under its revised policy.
 - Review its policy on post 16 (to 25) SEND travel (2019) and revise it to properly reflect the test set out in law. The policy should be clear that the Council has a statutory duty to provide transport to post-19 learners if it is considered 'necessary', not exceptional.
 - Properly reflect in its revised policy the difference between the approaches the Council should be taking for young people aged 16-18 and those over 19.
 - Make the finalised policy available on its website.
56. The Council must consider this report and confirm within three months the action it has taken or proposed 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

57. We find fault with the Council's school transport policy. We have made recommendations to remedy the injustice caused by the fault identified.