

London Borough of Lambeth (18 008 409)

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Decision : **Upheld**

Decision date : **07 Mar 2019**

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The Ombudsman's final decision:

Summary: There was fault by the Council in not carrying out an individual assessment of eligibility for home to school transport on the grounds of special educational needs and mobility difficulties and in not providing for an independent panel to hear the appeal. The complainant's child is now able to travel by public transport and has recently withdrawn their transport application. Recommendations are made for the Council to review inconsistencies between its published policy, its practice and the statutory guidance to prevent recurrence of similar fault in other cases.

The complaint

1. The complainant, whom I shall refer to as Ms Y, complained about the Council's decision not to provide free home to school transport for her son, whom I shall refer to as Z. Z has special educational needs (SEN). Ms Y said the failure to provide home to school transport meant Z had to travel to school unaccompanied, when he was not safe to do so.

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The Ombudsman's role and powers

2. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word 'fault' to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (Local Government Act 1974, section 34(3), 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. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (Local Government Act 1974, section 30(1B) and 34H(i), as amended)

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How I considered this complaint

5. I have considered information provided by Ms Y and the Council including:
 - o The transport application
 - o The appeal documents

- The Council's home to school transport policy for 5-16 year olds
 - The Council's home to school transport policy for pupils with SEN
 - The Council's response to my enquiries.
6. I have also spoken to Ms Y by telephone.
7. I have considered:
- relevant law and statutory guidance
 - our Focus Report 'All on Board? Navigating School Transport Issues', March 2017.
8. I have written to Ms Y and the Council with my draft decision and given them an opportunity to comment.
9. 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 decision with Ofsted.

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What I found

10. Section 508B of the Education Act 1996 ('The Act') says councils must provide free school transport to eligible children. The term 'eligible' means children of compulsory school age who meet certain criteria as set out in Schedule 35B of the Act. Eligible children include:
- Those who live outside the statutory walking distance to school (currently 2 miles if under 8 years and 3 miles if between 8-16 years).
 - Children who have SEN or are disabled or have mobility problems and cannot reasonably be expected to walk to school where the school is within the statutory walking distance.
11. Councils also have discretion under s.508C of the Act to make provision for non-eligible children where they consider it 'necessary' to facilitate the child's attendance at school.
12. The Government has issued statutory guidance 'Home to School travel and transport' for local authorities' ('the Guidance'). Councils must have regard to the Guidance when carrying out their duties. This means Councils can depart from the Guidance, but if they do, they must have a good reason for doing so.

13. The Guidance says:

- Eligibility under SEN / mobility grounds must be assessed on an individual basis to identify the particular travel requirements of the child or young person. Usual travel requirements (for example the statutory walking distances) should not be considered when assessing the transport needs of children eligible due to SEN or mobility.
- In determining whether a child cannot reasonably be expected to walk for the purposes of 'special educational needs, a disability or mobility problems eligibility'...the local authority will need to consider:
 - a. whether the child could reasonably be expected to walk if accompanied and, if so,
 - b. whether the child's parent can reasonably be expected to accompany the child.
- When considering whether a child's parent can reasonably be expected to accompany the child on the journey to school a range of factors may need to be taken into account, such as the age of the child and whether one would ordinarily expect a child of that age to be accompanied.
- The general expectation is that a child will be accompanied by a parent where necessary, unless there is a 'good reason' why it is not reasonable to expect the parent to do so.

14. The statutory guidance says local authorities should have in place both complaints and appeals procedures. The Guidance recommends all local authorities adopt the appeals process set out in the Guidance which should include a completely impartial second stage.

15. The Guidance recommends a two stage appeal process:

- Stage one – review by a senior officer
- Stage two – review by an independent appeal panel which will consider verbal and written representations from both the parent and officers involved in the case. Panel members should be independent of the original decision making process but are not required to be independent of the local authority.
- At both stages a written decision providing the rationale for the decision and evidence considered should be provided.

16. The Guidance says panel members must be independent and suitably experienced to 'ensure a balance is achieved between meeting the needs of the parent and the local authority'.

The Council's transport policies

17. The Council has two application processes for transport support:
- a. For pupils with a Statement of SEN or an Education, Health and Care (EHC) Plan:
 1. Parents must complete an application for 'SEND travel assistance' form
 2. The application is considered under the Council's SEN Travel Assistance policy
 3. Each application is considered by a fortnightly SEN panel
 4. There is a right of appeal in two stages:
 - a. Stage one – the Head of SEN Transport will present the case to the SEN panel for re-consideration
 - b. Stage two – appeals will be considered independently of Lambeth's SEN service by an 'SEN Transport Appeals Panel'.
 - b. For pupils without a Statement or EHC Plan:
 1. Parents must complete an application form for Pupil Transport Support
 2. The application is assessed under the Council's Pupil Transport Support (for pupils with no Statement of SEN, aged 5-16) policy
 3. The parent can appeal the decision to the SEN Transport Manager. This is a one stage process.
18. The SEN transport assistance policy says:
- o Eligibility is based on the needs of the child and not family circumstances such as parental/carer employment responsibilities. However, the Authority may take family circumstances into account when considering the type of assistance to be offered.
 - o A child or young person may be eligible for travel assistance if they have a Statement of SEN (or EHC Plan), live within the statutory walking distance (of 3 miles for secondary age) but be unable to walk relatively short distances owing to disability or mobility problems and family circumstances make it impossible for the parent or carer to take the child to school.
 - o In the absence of exceptional circumstances the child / young person will not be eligible for assistance if:

- a. Transport is being requested solely to facilitate attendance at school. It is a parental responsibility to ensure children attend school regularly.
- b. Where higher rate disability living allowance (DLA) for Mobility has been issued for the benefit of the child.

The Facts

19. Z transferred from primary to secondary school in September 2018. Z attends a mainstream secondary school which is 1.7 miles from his home.
20. Ms Y applied for transport support in April 2018 using the SEND travel assistance form. Ms Y stated:
 - o Z was currently escorted by her on the bus to his primary school
 - o This was an application for transfer to secondary school
 - o She was a single parent and had to take her other child to primary school
 - o Her work pattern varied depending on the availability of work
 - o Due to his SEN, Z was unsafe to travel independently.
21. The Council's SEN transport Manager refused the application in May 2018 on the grounds:
 - o it not meet the distance criteria
 - o there is an available breakfast club at the other child's primary school
 - o the Council would propose independent travel training.
22. Ms Y appealed the decision on the grounds distance criteria did not apply because of Z's SEN.
23. The appeal was considered at stage 1 by the SEN Panel in July 2018 which upheld the original decision. The decision letter gave more information about the rationale:
 - o The Council considered if Ms Y used the wrap around care at the primary school for her other child there was enough time for her to also accompany Z to school
 - o While the statutory guidance suggests distance should not be considered for pupils with SEN it was an important factor in considering whether it was reasonable for a parent to accompany their child around other commitments
 - o Public transport was free for school aged pupils in London and it would only be exceptional cases where using public transport and/or

walking accompanied is not an option that the Council would offer assisted transport

- Ms Y's appeal that Z could not travel by bus due to his SEN was not compatible with the information on her original application that she did travel with him by bus.

24. Ms Z appealed to stage 2. A different officer independent of the SEN team decided the stage two appeal on the papers. The Officer advised the decision not to award transport was justified as it was expected the majority of parents of children with SEN are able to accompany them to school and travel assistance was provided where clear evidence was provided the child was unable to manage this. There was no evidence to suggest Z could not travel by public transport, accompanied as necessary. Additionally, the wrap around care offered at the primary school afforded Ms Y the opportunity to accompany Z to school. The Officer confirmed the offer of independent travel training remained open.

Council's response to my enquiries

25. The Council told me:

- It does not consider parent's working practices to be the sole consideration for requiring travel support. All working parents are expected to make suitable arrangements to ensure their child's attendance at school, by utilising wrap around facilities at school or childcare options to manage this. When looking at a parent's employment it would look at a range of factors, for example distance.
- If the child's SEN meant they were unable to walk or travel on public transport, if accompanied the Council would look to offer support.
- The Council says Ms Y's request was not based on SEN but solely on her having to work.
- With regard to the statutory guidance that councils take the age of the child into account, the Council refers to the general expectation for parents to accompany their child to school. In the stage two appeal the officer felt that independent travel training might be a helpful offer to enable the young person to develop the skills to travel unaccompanied.
- The Council says it is in the process of updating its travel policy but the expectation around parental accompaniment is likely to remain unchanged.

Analysis

Fault

Individual assessment of SEN / mobility grounds

26. Ms Y's application was clearly made on SEN grounds and she used the SEND travel assistance form. When a council receives an application on SEN / mobility grounds it must carry out an individual assessment of needs and explain in its decision its findings and the evidence it had gathered / considered. This did not happen and was fault.
27. The Council did not explain why it did not agree that Z had the travel problems associated with his SEN and mobility difficulties that Ms Y said he did. This was fault and made it harder for Ms Y to know how to frame her appeal.
28. The stage one appeal did however provide more detailed reasons and did address SEN/mobility needs.

Independent appeal panel

29. When Ms Y appealed to stage two, the appeal did not follow the recommended process set out in the Guidance or in the Council's own policy. This was fault. The Council's own policy specifically states that the appeal will be heard by a panel and not a single officer. This gives applicants a legitimate expectation that their appeal will be heard by an independent panel of at least three members.

Council's policy

30. I have exercised discretion to investigate matters coming to my attention which may adversely affect other families applying for school transport. (Local Government Act 1974, section 26D and 34E, as amended)
31. The Council says it expects parents to accompany children regardless of their age. This approach is not compatible with the Guidance that Councils should take into account 'age and whether one would ordinarily expect a child of that age to be accompanied'. The question the Council (and appeal panel) had to ask itself was at what age would it usually expect a child to be able to independently travel the route concerned and then having reached on a view on that point, it then had to go on to consider whether if parents of other children the same age would not have to

- accompany their children, whether it was reasonable to ask a parent of a child with SEN/mobility needs to do so and give a rationale for its decision.
32. The Council's policy does not use the wording from the statutory guidance, which is in essence a 'reasonableness' test (reasonably be expected to walk, reasonable to accompany, good reason not to accompany), but uses wording such as 'exceptional' and 'impossible'. This suggests the Council may be applying a higher bar for support than the law and Guidance provides for, and that less discretion is available to decision makers and appeal panel members to determine what is 'reasonable'.
 33. The policy also says 'eligibility is based on the needs of the child and not family circumstances such as parental/carer employment responsibilities'. This is not compatible with the Guidance which says that Councils must take into a range of factors when considering if it is reasonable for a parent to accompany their child and consider if there is a 'good reason' for them not to. Employment and other caring responsibilities could be a 'good reason' and the policy should not seek to fetter the discretion of decision makers or appeal panels in this way.
 34. In this particular case the Council has evidenced that it has taken into account Ms Y's employment and other family responsibilities, even though the policy says it does not take such factors into account. This is confusing and other parents may be put off applying or appealing if they wrongly believe decision makers have no discretion to consider such factors.
 35. The Council's policy precludes transport support where a child receives higher rate DLA. The Department of Education has confirmed in Parliament that receipt of this allowance does not necessarily confer eligibility for free transport, but neither does it preclude it if the child is an eligible child. (Focus Report 'All on board?') Again, this could discourage parents from applying and decision makers from considering individual circumstances.

Injustice

36. Following receipt of my draft decision Ms Y advised me that Z has now got used to travelling to his secondary school by bus and is travelling with a group of friends and supported by her by telephone on journeys. Ms Y told me she does not now wish to pursue her application for transport or require a personal remedy for her complaint.
37. There is potential injustice to other pupils who may be affected by faults I have identified in the handling of Ms Y's case. (Local Government Act

1974, section 26D and 34E, as amended)

Agreed action

38. The Council says it is due to review its policy. It has agreed that when it does so it will check its policy wording against the law and Guidance and that the policy and its working practice are consistent. In particular, it will consider:
- The wording about DLA
 - The wording about employment and family circumstances
 - Use of wording such as 'exceptional' and 'impossible' in relation to whether a child is an eligible child and whether it would be preferable to adopt the wording used in the Guidance.
 - The requirement to take into account a range of factors including the age at which a child could usually be expected to travel the route unaccompanied
 - The appeal process it intends to use.
39. The Council will ensure when dealing with applications made on SEN / mobility grounds that it:
- Carries out an individual assessment including gathering evidence, where required as required by the Guidance, and
 - Explains its view on SEN / mobility needs and sets out the evidence considered in its decision letters.

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Final decision

40. There were faults in the way the Council considered an application and appeal for school transport on SEN/mobility grounds and inconsistencies between its policy and statutory guidance. The individual complainant is now using public transport but the faults identified may adversely affect other applicants in similar circumstances. The Council has agreed to consider lessons learned from this complaint in its forthcoming review of its policy and practice. I have completed my investigation as this is a satisfactory remedy.

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Investigator's decision on behalf of the Ombudsman

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