



CABINET – 24 APRIL 2023

**LOCAL GOVERNMENT AND SOCIAL CARE OMBUDSMAN REPORT
REGARDING POST-16 SPECIAL EDUCATION TRANSPORT**

**REPORT OF THE DIRECTOR OF LAW AND GOVERNANCE AND
THE DIRECTOR OF ENVIRONMENT AND TRANSPORT**

PART A

Purpose of the Report

1. The purpose of this report is to advise the Cabinet of a report of the Local Government and Social Care Ombudsman (LGSCO) in relation to the investigation of a complaint against the County Council as required by the relevant legislation where the LGSCO intends to issue his findings in a public report.
2. The complaint refers to the Council's duties to provide home to school travel assistance for eligible students under Education Act 1996. The LGSCO found fault with the Council which caused injustice to the complainant in the case. The LGSCO Report is attached to this report as Appendix A.

Recommendations

3. It is recommended that:
 - a) The public Report of the Local Government and Social Care Ombudsman (LGSCO) be noted;
 - b) The Director of Environment and Transport be required to implement the recommendations of the LGSCO as set out in paragraphs 52-53 of the LGSCO Report.

Reasons for Recommendations

4. To bring to the attention of the Cabinet the facts of the case and to explain the various actions which the Council is taking in light of the Ombudsman's findings.
5. When a public report is issued by the LGSCO there is a statutory requirement that it is 'laid before the authority concerned' and there is an obligation for the Council to report back to the LGSCO to confirm this action has been taken.

Timetable for Decisions (including Scrutiny)

6. A report on complaints, including complaints to the LGSCO, and outcomes is made to the Corporate Governance Committee annually and the outcome of this report will form part of the next annual report to that Committee.
7. The LGSCO requires the Council to confirm the action that it has taken or proposes to take within three months of the date of the Report.

Policy Framework and Previous Decisions

8. Local Authorities have a statutory duty to publish a transport policy setting out the travel options they feel necessary to enable attendance at education or training for students aged 5 to 19.
9. The Council has a separate SEN transport policy for learners aged 16 to 19 which provides for a Personal Transport Budget (PTB) being the default provision for learners of this age.

Resource Implications

10. An Action Plan has been developed to address the implications of the LGSCO recommendations and it has been appended to this report (Appendix B).
11. The Director of Corporate Resources has been consulted on this report.

Circulation under the Local Issues Alert Procedure

None.

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PART B

Background

The Complaint

12. The complainant's son is now 18 years old. He has attended the same special needs school for many years as it caters for children from 4 to 19 years. The Council provided home to school transport for the student whilst of statutory school age.
13. The complainant applied for home to school transport to continue for her son from September 2021; the application was submitted in February 2021. Her son was staying at the same school and was in the post-16 part of the school.
14. The application was first considered in early April 2021 but was not progressed due to a lack of mandatory information. After receiving the necessary information, a decision was reached in June 2021 and the parent was offered a Personal Transport Budget (PTB) to cover school transport costs herself directly.
15. The parent contacted the Council in July 2021 for advice regarding how the PTB could be used and concluded it was unsuitable due to the complexity of her son's needs. She was advised of her right to appeal and how the process worked. In August 2021 the Council rejected the appeal for traditional taxi-based provision at stage one. The parent proceeded to stage two of the appeal process.
16. The stage two appeal took place in October 2021. The appeal panel upheld the appeal, and the parent was informed of this decision on the same day. The Council began providing transport in January 2022 and the parent requested reimbursement for the interim payments to that date. The Council responded advising it did not reimburse travel costs incurred during the period of transport appeals. At this point, the matter was also referred as a formal complaint to the Ombudsman.

The LGSCO Review

17. The review focused on five key aspects of the case:
 - 1) The application process was found to have caused an avoidable two-month delay in assessing the application.
 - 2) The appeal process was found at fault due to the website information making it difficult for parents to find out how to appeal and requests for further information from the parent being unnecessary.
 - 3) The delay of three months in providing transport post-appeal was judged unacceptably long, especially as no alternative provision was put in place. The review also rejected the arguments regarding the Council's refusal to back-date the cost of provision to the date of the successful appeal.

- 4) The delay in the process was found to mean that young people with disabilities or an Education Health and Care Plan (EHCP) are placed at a disadvantage compared to others.
- 5) The delays in the process were found to have caused the parent injustice due to the lost opportunity to have the appeal heard and transport arranged earlier and avoidable distress.

The LGSCO Recommendations

18. LGSCO recommended that to remedy the injustice caused to the complainant the Council should:
 - 1) Apologise to the parent for the identified fault and the injustice this caused.
 - 2) Reimburse the costs incurred in paying for taxis for the Autumn term minus the PTB payments made and the required parental contribution subject to provision of evidence of the costs being provided.
 - 3) Pay an additional £500 to recognise the avoidable distress the Council's poor handling of the application and appeal caused her in the form of frustration, uncertainty, stress, and worry.

19. To resolve the broader issues highlighted, the Council should:
 - 1) Ensure the information it provides to transport applicants on its website, emails and letters is accurate. This includes information on how long it will take to consider applications and how quickly it will put in place transport following a successful appeal.
 - 2) Consider providing information about the appeals process in relation to Special Educational Needs and Disability (SEND) transport in the SEND transport policy and/or post-16 transport policy statement policy rather than requiring parents of SEND children to cross-refer to the mainstream policy for this information.
 - 3) Consider undertaking an initial triage of basic information on transport applications to ensure issues with, for example, names or missing information may be identified and dealt with promptly.
 - 4) Ensure that appeals are accepted even if they are completed using the wrong form if the essential information is provided.
 - 5) Devise a system whereby applications for children with an EHCP, where a school is not yet confirmed or the EHCP is not yet finalised, are not unfairly disadvantaged.
 - 6) Provide the LGSCO with information about the outcomes of the Council's own review of the points raised by this report.
 - 7) Meet the costs of transport if this is being arranged and paid for by parents where it is unable to put in place transport after a successful transport appeal. It may take around four weeks to arrange suitable transport provision. However, when this is not possible, the Council should discuss with the family to agree an acceptable solution, including - where necessary - full reimbursement of agreed and evidenced transport costs incurred by the family.

The Council's Response

Context

20. It should be noted that the period in question was the first year of the implementation of a new post-16 transport policy and as a result, the Council experienced significantly higher work volumes than previously. In response, the Council invested in two new support roles to meet demand. Additional mitigation included monthly payments of a PTB during the appeal period.
21. During the period, 179 first stage appeals and 33 second stage appeals were processed, significantly more than in other years. The Covid-19 pandemic was also affecting delivery with 75 contract terminations during the period, 33% more than in the same period in 2020, and the complexity of needs of the student severely restricted vehicle supply from the market. There were also no other referrals escalated to the LGSCO regarding the service at this time.
22. In this context, the case should be seen as exceptional.

The appeals process

23. Regarding the lack of time to fully consider applications and then hear and consider appeals against transport decisions reached late in the February to August window, the Council had not anticipated that some EHCPs would not be finalised until late in the period. Transport provision for 16 to 19 year olds is discretionary and a PTB is the standard offer with the appeals process being the mechanism to challenge this standard offer. The decision of the appeal is the point at which any different provision is agreed, and there is no retrospective entitlement following an appeal panel decision. To confirm, there were 26 appeals that were fully completed before the beginning of the school year in September 2021 and 15 (nearly 60%) of these were upheld.

The delay in putting transport in place following the successful appeal in October 2021

24. Putting in place transport following the successful appeal was a priority, but the contextual information referred to above were factors which militated against this on this occasion. Additionally, demand for wheelchair accessible vehicles is high making it more difficult to arrange this provision on occasion.
25. SEN transport has been identified as Council's priority for improvement and a consultant has been appointed to review Council's system of transport delivery and is putting in place both long and short-term actions to bring about improvements. In addition, the above example should be seen within the national SEN transport funding crisis in which the Council is pro-actively leading national dialogue via a local authority joint working group across Transport and Childrens services.

The Council's Response to the final Report

26. The Council has accepted the recommendations set out in the Report and has already started work developing an Action Plan to address the recommendations. The Council has also formally apologised to the complainant and will reimburse her losses as recommended. It is anticipated that all actions will be completed within the stipulated timescales.

Legal Implications

27. The Council is under a statutory duty to prepare a transport policy statement specifying the arrangements for the provision of transport for post-16 students. This must include the arrangements for financial assistance in respect of reasonable travelling expenses and there are various requirements in relation to publication of the arrangements¹. The statement has to also address the arrangements for facilitating attendance of disabled students. The policy statement has been subject to judicial consideration by the High Court and Court of Appeal² and has been found to be lawful and sound.
28. Section 31(2) of the Local Government Act 1974 requires the Council to lay the LGSCO report before elected members for consideration.
29. It is expected and usual practice for the Council to comply with all recommendations of the LGSCO. In this instance, the Council fully accepted the findings and considers the recommendations to be fair and reasonable.
30. If the LGSCO is not content with the approach that the Council has adopted, he may issue a further report setting out that he is not satisfied with the action of the Council and he may make further recommendations.
31. Following the issuing of a public report, there are also various requirements in relation to publicity and as with most LGSCO reports these are publicly available documents. The LGSCO requires that the Council publishes a notice in the local press and also shares the final report with the Cabinet. As a courtesy, the report is also shared with the Chair and Spokespersons of the Corporate Governance Committee as the Council's body with oversight of complaints and the work of the LGSCO.

Equality Implications

32. The report highlights an issue in relation to how the timing of the process impacts on students with a disability and the Council will carefully consider how to address this as part of the review following the Ombudsman's Report in this case.

¹ s509AA Education Act 1996

² Court of Appeal (Civil Division) [2020] EWCA Civ 502

Human Rights Implications

33. There is a general requirement that no person shall be denied a right to education; that right does not extend to the right to the provision of transport and is further qualified to enable the Local Authority to make practical objective decisions on the allocation of resources. The issue of the prohibition of discrimination in the enjoyment of the right to education was considered by the High Court and Court of Appeal in the Judicial Review of the SEN transport policy in 2021 and the Court of Appeal confirmed that the policy is not discriminatory as (1) it strikes a fair balance between the rights of post-16 students and the general public interest in reducing expenditure; and (2) the court should be slow to intervene in a public authority's decision about the allocation of scarce resources given that decisions of this kind involved 'difficult choices in straitened financial circumstances'.

Background Papers

Department for Education: Post-16 transport and travel support to education and training Statutory guidance for local authorities – <https://bit.ly/2URgks9>

Department for Education: Home to school travel and transport guidance - Statutory guidance for local authorities - <https://bit.ly/2TOhrs1>

Appendices

Appendix A - Report of the Local Government and Social Care Ombudsman

Appendix B - Action Plan

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