

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

**Investigation into a complaint against
Gateshead Metropolitan Borough Council
(reference number: 16 019 471)**

3 October 2018

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

Mr and Mrs B	The complainants
F	Their foster child

Report summary

Education and children's services

Mr and Mrs B complain the Council wrongly refused to provide free home to school transport for F, a child they foster for the Council. F is subject of a Full Care Order, has special needs and attends a special needs school.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused, we recommend the Council:

- apologise to Mr and Mrs B for the failings identified;
- ensure Mr and Mrs B are not out of pocket for costs related to transporting F to and from school from 2016. To achieve this, it should pay the costs of transporting F for the first 15 miles of his school trip to and from school on the days he has attended. It should pay this at its usual mileage rate for foster carers and include payment for the foster carers' return journey for each trip. Its payment calculation should subtract the costs already covered by the Council when a taxi was provided and paid for in early 2017 and not include the additional two miles for which it has already been paying;
- make a further payment of £500 to recognise the distress, uncertainty, inconvenience and frustration caused by the Council's faulty handling of the couple's requests for provision of transport from Autumn 2016 and/or its failure to reconsider the details of its contract with the fostering agency;
- take responsibility now for arranging transport or covering the additional costs incurred by taking F to and from Q school;
- undertake a comprehensive review of its policies regarding consideration and provision of free home to school transport to looked after children where contracted placements with independent fostering providers are in place;
- clarify what its expectations are with the independent fostering agency with regard to whether the cost of home to school transport is met by the agency out of the total fee it pays to the agency rather than passed on to the foster carers to pay out of their element of the fee. Ensure this is clear in future contracts/tendering details; and
- pay Mr and Mrs B a further £250 to recognise the avoidable time and trouble they have incurred in having to bring this matter to us for resolution.

The Council has accepted our recommendations.

The complaint

1. Mr and Mrs B complain that the Council wrongly refused to provide free home to school transport for F after it agreed he could move to a new school from September 2016. F attends a special needs school that is located in a different council's area and is 17 miles from the foster carer's home. The Council argues it should not have to provide free transport for F because:
 - it has a contract with the private fostering agency and this agency placed F with Mr and Mrs B. This contract states the usual fee the Council pays to the agency includes the cost of transport to school up to a distance of 15 miles; and
 - F could attend a school that meets his educational needs nearer to Mr and Mrs B's home.

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*)

Legal responsibility for looked after children

3. A council has parental responsibility for any looked after child in its care. This includes a child for whom the court has awarded it a full care order under section 31 of the Children Act 1989. This means the council makes all significant decisions relating to the child including decisions related to where s/he goes to school.

Special Educational Needs

4. A child with special educational needs may have an Education, Health and Care plan (EHC plan). This sets out the child's needs and what arrangements should be made to meet them. The EHC plan is set out in sections and names the school the child should attend. The Council that has issued the EHC plan must secure the provision specified in the plan including the school named in it.
5. Where a looked after child has an EHC plan and moves to a council area that is different to the council who has the full care order, the EHC plan transfers to the area in which the child is living. While the placing council no longer maintains the EHC plan, the placing council retains financial responsibility for the provision detailed in the EHC plan. "Guidance on Looked After Children with Special Educational Needs placed out of Authority" produced by the Department for Children, Schools and Families in 2009 (the 2009 Guidance) confirms that "...where the placing authority, as corporate parent, expresses a preference for a school further away and beyond reasonable walking distance, then the placing authority (as 'parent') will still be financially responsible for the transport".

Home to school travel arrangements

6. Under the Education Act 1996 local authorities must make 'suitable travel arrangements', 'as they consider necessary', for 'eligible children' to attend their 'qualifying school'. This transport must be provided free of charge.
7. 'Eligible children' are defined in Schedule 35B of the 1996 Act. They include:
 - children living outside 'statutory walking distance' from the school (two miles for children under eight, three miles for children between eight and 16); and
 - children living within walking distance of the school but who cannot reasonably be expected to walk to school because of their special educational needs, disability or mobility problem.
8. Section 508B(1) of the 1996 Act states that "A [local authority] in England must make, in the case of an eligible child ***in the authority's area*** (our emphasis) to whom subsection 508B(2) applies, such travel arrangements as they consider necessary in order to secure that suitable home to school travel arrangements, for the purpose of facilitating the child's attendance at the relevant educational establishment in relation to him, are made and provided free of charge in relation to the child". Section 508B(2) states that transport must be provided to a child where no other free travel arrangements have been put in place by anyone else or where transport is provided but it is not suitable.
9. The relevant 'qualifying school' is the nearest school with places available that provides 'education appropriate to the age, ability and aptitude of the child, and any special educational needs the child may have'. 'Qualifying schools' include community special schools.

The Council's contract with the independent fostering agency

10. The Council has a contract with the independent fostering agency which placed F with Mr and Mrs B. This appears to be a standard agreement applied to all independent fostering agencies. The contract states the fee provided to the agency is to cover the provision of a number of elements of the child's needs including, for example, 24 hour care and accommodation, basic clothing and school uniform, holidays, assessment of need (including the provision of reports), taxi costs and "transport costs up to 15 miles including to school unless agreed otherwise on an individual basis".
11. The written agreement states the Council and the agency may agree a different arrangement around transport costs but any such agreement will be specified in the Individual Placement Agreement. F's Individual Placement Agreement (which is signed by representatives of the Council and the independent fostering agency) provides for no additional services or fees in addition to the basic fee.

How we considered this complaint

12. We produced this report after examining relevant documents.
13. We gave Mr and Mrs B 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.

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14. 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 report with Ofsted.

What we found

Background

15. F is subject of a full care order to Gateshead Metropolitan Borough Council. He has multiple disabilities and complex health needs. Mr and Mrs B began caring for him in 2012.
16. Mr and Mrs B are foster carers for an independent fostering agency that the Council engaged to provide F's care. The Council pays a fee to the agency. The agency then pays Mr and Mrs B. The Council has agreed that F's placement with Mr and Mrs B is a long-term placement.
17. Mr and Mrs B live in a neighbouring council area (Council A) and have done for the entirety of the time F has lived with them.
18. The Council provided free home to school transport in the form of a taxi to take F to and from school from 2012 until July 2016.

What happened

19. Until July 2016 F attended a community special needs school (P School) that specialised in working with children with complex multiple and severe learning difficulties and children with autism. This school was around seven miles from Mr and Mrs B's home and was named in F's EHC plan which was, at that time, issued by the Council.
20. In July 2016, the Council's children's services team arranged a meeting regarding F. The notes of this meeting state Mr and Mrs B wanted F to move to a new special needs school (Q School) as they considered it would be better for F's learning. The notes of the meeting state that officers said if F began attending Q School, the Council would not provide free home to school transport. The notes state this was because the foster carers were from an independent fostering agency. According to Mr and Mrs B, it was agreed for F to change to Q School at an EHC Plan review meeting in June and addressed again at a looked after child review meeting in August 2016. Mr and Mrs B felt very strongly Q School would meet F's needs more effectively and had been asking the Council to consider moving F to Q School for some time.
21. In September F began attending Q School which is around 17 miles from the foster carers' home.
22. In October, a new EHC plan was issued by Council A where Mr and Mrs B live. This stated the Council would fund a placement at Q School which is in another council's area.
23. Mrs B currently drives F to and from school. Mr and Mrs B are unhappy the Council has not agreed to provide or pay for F's transport to the new school as it did when he attended P School. They argue there is no nearer school that can fully meet F's needs. The Council argues none of the professionals working with F were concerned or unhappy about F's placement at the original school though it is clear the Council agreed to F moving to Q School. It argues that Mr and Mrs B or the fostering agency are liable to pay transport costs up to 15 miles as detailed in the written agreement/contract between the Council and the agency.

Home to school transport arrangements since F began living with Mr and Mrs B

24. The Council says it wrongly paid for F's school transport in the form of a taxi shortly after it placed him with Mr and Mrs B in 2012 until July 2016. The Council says under the terms of its contract with the independent fostering agency it was the responsibility of the agency or the foster carer to pay for the transport up to 15 miles and so it should not have provided transport from the time F was placed with Mr and Mrs B. However, the Council did not withdraw the provision until F moved to School Q in September 2016. It seems therefore, that the change of school was the catalyst for this withdrawal and the implementation of the terms of its contract with the fostering agency.
25. Mr and Mrs B do not agree the Council told them transport would not be provided and say they had no reason to think it may not be given as it had been provided since 2012.
26. In November 2016 Mr and Mrs B asked the Council to provide free home to school transport for F to travel to Q School under its school transport policy. The Council refused and Mr and Mrs B asked it to review this decision.
27. In December 2016, a senior manager in the children's services team reviewed the decision and agreed that it would arrange home to school transport in the form of a taxi from the beginning of the new school term in January until February half-term in 2017. However, it said either Mr and Mrs B or the independent fostering agency would be invoiced for the cost of this up to 15 miles and the Council would cover the cost of the distance beyond this. The Council states this contribution was not received from either Mr and Mrs B or the fostering agency. The Council reports the fostering agency expressed concerns about the stability of the foster placement if Mr and Mrs B were required to pay for the taxis and so the Council says it waived this amount (£1841) as a goodwill gesture. To further support the stability of the placement the Council says it then agreed to continue to pay Mr and Mrs B £48 a week to cover the transport costs over the 15 mile distance limit even though it considers the previous closer school was suitable to meet F's needs.
28. The Council confirms it agreed with Council A that in naming Q School on the EHC plan Council A would not be liable to provide free home to school transport because of the provisions in its contract with regard to the provision and cost of the home to school transport.

Analysis

The decision to place F at Q School

29. Because the Council has a full care order for F, it has parental responsibility for him and is consequently responsible for making all significant decisions related to his care. The foster carers do not have the authority to make any significant decisions relating to F and have to rely on the Council to do this. The decision to place F at Q School was therefore a decision that could only be taken by the Council. This is the case even though the Council argues it only agreed to place F at Q School because Mr and Mrs B requested it. The Council argues that it felt pressured to agree to the change of school in order to ensure the stability of the placement. This is not an acceptable position for the Council to take: it was the Council's decision to ask Council A to name Q School in F's EHC plan.

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30. The 2009 Guidance confirms financial responsibility for providing transport for F to attend the school named in the EHC plan remains with the Council. The Council should have considered the consequences of agreeing the new school properly and, if it expected either the fostering agency or Mr and Mrs B to meet the additional transport costs under the existing contractual arrangements, this should have been clarified in writing to them both before the move was arranged. This is particularly the case given it had been arranging and paying for free home to school transport for F since 2012. There is no evidence this happened. Mr and Mrs X did not have a copy of the contract between the Council and the agency so were not aware of the existence of the provision around payment of transport costs. It seems entirely reasonable they believed the existing arrangements would continue.

Should the Council provide F with transport under the 1996 Act?

31. Mr and Mrs B asked the Council to provide free home to school transport under the 1996 Act following the withdrawal of the taxi in Autumn 2016. The Council did not do this. Instead, it stated transport was already provided for under its contract with the independent fostering agency.
32. This was fault. The existence of the contract does not relieve the Council of its duties under the 1996 Act. The Council should have considered the individual circumstances of the case and decided whether F was eligible for free home-to-school travel.
33. A determination in the Upper Tribunal addresses how transport should be arranged for children with ECH plans. The case of *Dudley MBC v JS* [2011] UKUT 67 (AAC) explains that councils can name two schools on a statement of special educational needs (the predecessor to ECH plans) in situations where it agrees to place a child in a school preferred by the parents/carers, but where there is another school closer to the child's home which it considers is suitable to meet the child's needs.
34. In this scenario, the parents/carers are expected to meet the costs of transport to the preferred school, on the basis the council has arranged for provision to be made at a school closer to their home. If parents/carers disagree with the decision to name the closer school on the ECH plan, they can appeal to the First Tier Tribunal.
35. However, F's circumstances are slightly different to this case. As we understand it, F's ECH plan only names Q School. The Council cannot therefore rely on the 'nearer suitable school' exception, because it has not named P School on the ECH plan.
36. We therefore consider F is an eligible child for home-to-school transport provision. Under the terms of the 1996 Act, the Council must ensure this is provided free of charge. The Council is at fault for telling Mr and Mrs B there is a school closer to their home which is suitable for F, when that school is not named on the ECH plan.

The Contract

37. The contract between the Council and the independent fostering agency states the agency (and not the foster carers) are responsible for covering the cost of, and making arrangements for, transporting children placed with the carers to and from school (up to a distance of 15 miles). It does not seem therefore that, in its contract, the Council envisage the cost is necessarily passed on to the foster carers. There is no evidence the Council has pursued the agency's decision to

pass on the increased transport costs to Mr and Mrs B for them to pay from their existing fostering allowance.

38. Mr and Mrs B told us they receive a standard weekly fee payment from the agency of around £590 a week for caring for F. The Council pays the agency £980 a week. This payment is at the higher end of the Council's payment structure to recognise the high level of F's needs and of the skills the foster carers use to meet those needs. Mrs B told us to transport F to school she drives him 68 miles a day (four journeys of 17 miles). This means she is driving 340 miles a week to take F to and from school. She confirms the Council is reimbursing the cost of her transporting F for the additional two miles above the 15 miles specified in the contract and so she is paid £48 a week for this. Despite there being provision for it in the contract, no other long term special arrangements seem to have ever been considered regarding cost or provision of transport arrangements for the first 15 miles. As a result, Mr and Ms B are significantly out of pocket in covering the cost of most of the transport out of their standard fostering allowance. The Council's failure to consider making new exceptional arrangements as provided for under the contract following its decision to send F to a school much further away amounts to fault, as does its apparent failure to query the agency's decision to pass on the costs of the additional travel to the foster carers when the contract does not specify this.

Conclusions

Was there fault and did this cause injustice?

39. As F's corporate parent, the Council asked Council A to name Q School in F's EHC plan. Because there is no closer school named on the ECH Plan, having done so, the Council bears financial responsibility for meeting the cost of F's transport to school, and should provide it free of charge.
40. The Council wrongly relied on its existing contract with the independent fostering agency to discharge its responsibility to provide/pay for F's transport to school. Its contract provides that individual arrangements can be made around transport costs (to vary those provided for in the standard contract). The change of school placement in 2016 and the consequent additional financial and time burden on Mr and Mrs B should have been taken into account when the Council asked for Q school. In cases such as this, the Council should have considered whether an individual arrangement to accommodate this change should have been provided for in the contract. There is no evidence it did this. The full additional transport costs have been passed on to Mr and Mrs B. There is no evidence the Council has investigated whether the fostering agency has properly implemented the terms of the existing contract in passing on the transport costs to Mr and Mrs B when the contract does not specify this.
41. The Council did not consider Mr and Mrs B's request for transport under its own policies for provision of transport or the 1996 Act. There is no evidence the Council fully explained the implications of the change of school on transport to either Mr and Mrs B or the fostering agency before agreeing to the change of school so they could make a properly informed decision on this. This was a particular failure on the part of the Council given it had been providing free transport for F up to that time. In any event, the Council was at fault for ultimately passing these costs onto Mr and Mrs B, when F was eligible for free home to school transport.

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42. Mr and Mrs B have been financially penalised as a result of caring for a child who attends a special needs school a long distance from their home when compared to other carers looking after children with similar needs but who are attending schools nearer home. This amounts to fault which has caused injustice to Mr and Mrs B and F: as a result of them meeting the transport costs from their usual fee they have had less of their fostering allowance to cover all F's other needs since September 2016.

Recommendations

43. The Council must consider the report and confirm within three months 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*)
44. In addition to the requirements set out above the Council has agreed to:
- apologise to Mr and Mrs B for the failings identified;
 - ensure Mr and Mrs B are not out of pocket for costs related to transporting F to and from school from 2016. To achieve this, it should pay the costs of transporting F for the first 15 miles of his school trip to and from school on the days that he has attended. It should pay this at its usual mileage rate for foster carers and include payment for the foster carers' return journey for each trip. Its payment calculation should subtract the costs already covered by the Council when the taxi was provided and paid for in early 2017 and not include the additional two miles for which it has already been paying;
 - make a further payment of £500 to recognise the distress, uncertainty, inconvenience and frustration caused by the Council's faulty handling of their requests for provision of transport from Autumn 2016 and/or its failure to reconsider the details of its contract with the fostering agency;
 - take responsibility now for arranging transport or covering the additional costs incurred by taking F to and from Q school;
 - undertake a comprehensive review of its policies regarding consideration and provision of free home to school transport to looked after children where contracted placements with independent fostering providers are in place;
 - clarify what its expectations are with the independent fostering agency with regard to whether the cost of home to school transport is met by the agency out of the total fee it pays to the agency rather than passed on to the foster carers to pay out of their element of the fee. Ensure this is clear in future contracts/tendering details; and
 - pay Mr and Mrs B a further £250 to recognise the avoidable time and trouble they have incurred in having to bring this matter to us for resolution.

Decision

45. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mr and Mrs B and F. The Council should take the action identified in paragraph 44 to remedy that injustice.