

CABINET

11 JUNE 2019

COUNCIL RESPONSE TO LGO COMPLAINT RE MAINSTREAM HOME TO SCHOOL TRANSPORT DECISION AND POLICY

Portfolio Holders:	Councillor Mrs Josie Iles, Children's Services (Lead Member)
Report from:	Ian Sutherland, Director of People - Children and Adults Services
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Summary

This report seeks to obtain a Cabinet decision on the action to be taken in relation to a Local Government Ombudsman (LGO) complaint regarding mainstream home to school transport.

The LGO has advised that the Council's policy is not compliant with the statutory guidance issued by the Department for Education (DfE) and that they published a report of findings against the Council on 16 May 2019. They also advised that they have found evidence of fault causing injustice to the relevant family, which must be remedied.

Having reviewed the case in line with the LGO comments and taken external legal advice, officers are clear that the policy is compliant with the statutory guidance. External Counsel advice and clarification from the DfE supports the view of officers that the Medway Council Education Travel Assistance Policy (the formal name for the Council's home to school transport policy) is in line with the statutory guidance.

Officers have remained in discussions with the LGO for a considerable time in an attempt to resolve this matter. The LGO is still of the view that the Council are incorrect and plan to issue a finding of maladministration.

1. Budget and Policy Framework

- 1.1 All local authorities have a statutory duty to have in place arrangements for the provision of home to school transport travel assistance and transport for children and young people with Special Educational Needs and Disabilities (SEND) who meet the published eligibility criteria.

- 1.2 Under Section 7 of the Education Act 1996, it is the responsibility of the parent of every child of compulsory school age, to ensure their child receives efficient full time education either by regular attendance at school or otherwise. The duties and powers of local authorities to provide home to school travel assistance are covered in other sections of the Act and its amendments. The provision of travel assistance support incorporates consideration for children from low-income families.
- 1.3 Sections 508B and 508C of the Education Act 1996 (as amended) set out the local authority duties and powers respectively, to make such suitable travel arrangements as the local authority considers necessary, to facilitate a child's attendance at school. This applies to home to school transport and vice versa.

2. Background

- 2.1 The core of the complaint is in relation to whether the school that the pupil attended was the nearest qualifying school, with available places. In this particular case, the parent had not named the nearest qualifying school as a higher preference than the school the pupil was attending. The information, regarding the historical admissions trends for the nearest qualifying school, that the family had at the time of deciding which schools to apply for would have shown that they had every prospect of securing a place at the nearest qualifying school.
- 2.1.1 The Medway Council Education Travel Assistance Policy set out at Appendix 1 clearly states:
“For a child to be considered for home to school transport assistance when the school attended is not deemed the nearest qualifying school, parents/carers need to ensure that the nearest qualifying school has been named on the school application as a higher preference than the school being attended.
- *If the nearest qualifying school has not been applied for the children will not be eligible to the school attended even if it is over the minimum eligible distance.*
 - *If the nearest qualifying school has been applied for as the highest preference, but has not been offered, then home to school transport can be considered to the next nearest qualifying school if it has been listed as the next highest preference on the school application. This principle and the minimum eligible distance applies for further preferences.”*
- 2.1.2 The policy allows officers to use their judgement in coming to home to school transport decisions in exceptional circumstances based on the information available at the time of assessment and there is a 2-stage appeal process that families can access if they disagree with the decision.
- Stage 1 of the appeal process is a review of the decision by a senior officer, which (when requested by the parent) looks at the decision alongside the families reasons and any additional information provided that was not available to be considered at the time of initial assessment.
- 2.1.3 If Stage 1 is unsuccessful, families can lodge a Stage 2 appeal to the School Transport and Curriculum Appeals Committee (which is a Member panel), who consider the case and decide on whether the policy has been applied correctly and, if it has, whether there are exceptional circumstances that allow

them to grant transport assistance. The relevant family in this case have been through both stages of the appeals process and were unsuccessful at each stage.

- 2.2 The LGO's position is that, as the pupil lived further from the nearest qualifying school than the last child offered a place at the school, they could not have reasonably expected to be offered a place at the school and therefore free home to school transport should be granted to the school that the pupil was attending as the next nearest qualifying school. The LGO maintained that this was on the basis of the Statutory Home to School Transport Guidance which states,

"At the point when transport eligibility is considered, the prospect of being able to secure a place at an alternative (usually nearer) school must be a real one. For most cases this will be during the normal school admissions round when places are allocated."

- 2.3 The Council's case is that as a) the nearest qualifying school had been placed as a lower preference and the highest preference had been offered, the opportunity to consider whether the pupil would have had a reasonable opportunity of gaining a place at the nearest qualifying school would not have existed and b) the information available to the family at the time of the school application advised that the nearest qualifying school had been undersubscribed for the previous three admission years to their child's admissions year. It was, therefore, perfectly acceptable and reasonable to assume that the family had every prospect of securing a place at the nearest qualifying school. The School Transport and Curriculum Appeals Committee considered this when deciding on the outcome of the appeal.

- 2.4 In making this decision, the Council has also taken into consideration an almost identical case investigated by the LGO in 2015 which was not upheld by the LGO and in their decision statement. Indeed, the LGO made a very clear and unambiguous statement:

"It is not for the Ombudsman to intervene in a Council's decision where it has been made properly and according to the Council's agreed policy. The policy is in line with the law and government guidance and it is clear. Mr and Mrs R did not put school B, their nearest appropriate school, above school A on their application form. As they chose school A, they do not qualify for home to school transport help"

- 2.5 The LGO has investigated how parental expression of preferences for school places should be handled when assessing eligibility for home to school transport assistance. They have sought to take a consistent approach when investigating these cases considering the legal background and Government guidance, which they have reviewed and the LGO has sought its own legal advice.

- 2.5.1 The LGO has published internal guidance in June 2017 on which they would base all future decisions in respect of this matter.

- 2.5.2 This internal guidance states:

"We can see no basis in law for the council to insist the parent must have placed the nearest school as first place on the school admissions application form. It may be sensible for a parent to do so to guarantee any free transport"

they hope to rely upon. However, if a parent has applied in a second or lower preference and the parent then applies for school transport, the council should assess if the child would have got a place at the nearer school. This can be done by comparing the applicant with the last child to be awarded a place during the normal admissions round using the oversubscription criteria.”

- 2.5.3 It is important to note that there has been no change to the statutory guidance issued by the DfE since it was published in July 2014 and previous LGO decision have found no fault with the Council's policy in this regard. Indeed the number of appeals is relatively low compared to the number of children assessed as not eligible for travel assistance.
- 2.6 The LGO's continuing view is that the Council's policy is not compliant with the Statutory Guidance and should be amended to take account of the availability of places where the applicant applied for the nearest school at the time of the original admission application (regardless of preference rank). They have issued a report of findings against the Council and they have advised that they have found evidence of fault causing injustice, which must be remedied.
- 2.7 The Council continues to dispute the LGO's view and with the support of Portfolio Holders has taken external Counsel advice twice. This Counsel advice supports the view that the current Education Travel Assistance Policy is lawful and that this position also appears to be supported by the Department for Education and Secretary of State.
- 2.7.1 The Council has acknowledged to the LGO that there may be occasions where, at the time of school application, there is no real prospect of a family gaining a place at the nearest qualifying school. Officers have proposed to the LGO that in such situations, and as long as parents are able to supply evidence that they have made appropriate enquiries at the point of school application, discretion may be exercised in the assessment outcome. The Council does offer families the opportunity (before they apply for schools) to request the details of their nearest qualifying school for transport purposes.
- 2.8 In April 2018, officers contacted the DfE for their view and their response is that the provisions of the Medway Council policy is common practice across a number of local authorities and the DfE have advised that they "believe it is common practice for local authorities to have such policies and would agree that, in general, it is an **effective** and **acceptable** way of ascertaining whether a child is eligible for free home to school transport under section 508B".
- 2.9 Any actions in relation to whether to agree to the LGO recommendations or to continue to challenge them and not change the policy is a matter for Cabinet agreement.
- 2.10 In relation to the individual case related to the LGO complaint, the Council has offered the following resolutions:
- 1) a bus pass has been provided for the 2018/19 academic year. This was following a reassessment of the route, which identified that a path that was previously excluded was now in use and this altered the child's eligibility.
 - 2) as the path in question came back into use in 2017, the Council have offered to provide the family with the cost of the bus pass for the 2017/18

academic year (equivalent to £620.00) – this offer has not yet been accepted by the LGO.

The LGO is stating that the Council should also provide the cost of the bus pass for 2016/17 academic year, but the Council is maintaining the position that the child was not eligible in 2016/17 and, therefore, are declining to settle this amount, although can offer to provide a gesture of goodwill payment to the family.

3. Options

3.1 Following a review by Council officers including the Chief Legal Officer, there are three options on the course of action the Council may take in light of the LGO findings and the various advice received by the Council.

3.2 ***Option A:***

To accept the report, the findings and the recommendations of the LGO and change the Education Travel Assistance Policy to reflect the LGO recommendations.

3.3 ***Option B:***

To receive the report from the LGO, but not the recommendations and Judicially Review the LGO in relation to their findings.

3.4 ***Option C:***

To receive and note the report including the actions taken by the Council which they deem as reasonable and in line with policy and take no further action on its recommendations. Therefore, Cabinet is recommended to approve the continued use and application of the current policy.

The Council can also ask the Local Government Association (LGA) to take forward this matter as a sector wide issue (due to the differing manner in which each Local Authority interprets the DfE Statutory Guidance).

4. Advice and analysis

4.1 ***In regard to Option A:***

If the Council accepts and implements the LGO findings, there are substantial financial risks going forward if the assessment of eligibility for home to school transport were to be changed to take account of the LGO findings and recommendations. The level of this additional financial pressure would be determined by the additional number of children who are assessed as eligible for transport assistance each year.

This financial risk is in addition to a possible requirement to compensate the family concerned for transport costs since the child started secondary school in 2016, which equates to approximately £1,300 (being the costs of two annual scholars bus passes).

In order to adopt the LGO recommendations the Education Travel Assistance Policy that was determined by Cabinet on 10 April 2018 (decision No. 58/2018) would require amendment. All amendments to policy are a matter for cabinet and, therefore the Education Travel Assistance Policy would need to be amended and presented back to Cabinet for determination.

4.2 ***In regard to Option B:***

If the Council decides to receive the report from the LGO, but not the recommendations and Judicially Reviews the LGO on their findings, there are potentially significant financial and reputational risks with no guarantee of a finding in the Council's favour.

4.3 ***In regard to Option C:***

Officers' position has consistently been that the Education Travel Assistance Policy is in line with and compliant with all statutory guidance issued by the DfE. This position is borne out by previous LGO decisions, external Counsel advice and clarification from the DfE themselves.

A decision to receive the report and take no further action on the LGO's recommendations has associated risks for the Council. Further to the initial report published by the LGO on 16 May 2019, the LGO may issue a Section 30 report of a finding of fault against the Council and is likely to determine that maladministration has taken place. The LGO findings and report will be publically available. In response to this, a further report to the Cabinet will be required. This leads to potentially significant reputational risk for the Council and could lead to a legal challenge against the Council in relation to the assessment of eligibility for and provision of home to school transport. This is the recommended option.

5. **Risk management**

5.1 There are risks associated with whichever of the above options is determined by Cabinet to progress. The below table provides a summary of these.

Risk	Description	Action to avoid or mitigate risk	Risk rating
Option A: Additional financial pressures on home to school transport budget	There could be a significant financial pressure on the Council and the home to school transport budgets from additional eligible children. Estimates range from £30-£330k per annum recurring	Additional resources would need to be allocated to fund the decision and associated additional administration and transport costs	C2
Additional requests for review of previous decisions	This decision may result in a large number of additional requests for a review of historic decisions, placing increased demand on internal resources	These would have to be processed which may require temporary resources to manage the workload	C3
Option B: Reputational Risk	There could be detrimental reputation risk for the Council in continuing to challenge the LGO in the public arena	Effective communications and sensitive management of information flow	C2

Financial risk in relation to the costs of Judicial Review	The costs of undertaking a Judicial Review could be significant	Seek support from LGA to take forward the case on behalf of the whole sector. Set aside significant funding to cover the costs of proceedings	C2
Finding against the Council	The Court may decide against the Council leading to the need to implement the LGO recommendations and facing significant challenge	Seek support from LGA to take forward the case on behalf of the whole sector. Set aside significant funding to cover the costs of proceedings	C2
Option C: Reputational Risk	There could be detrimental reputation risk for the Council in taking no further action on the LGO recommendations	Effective communications and sensitive management of the information flow	C2
Finding of maladministration against the Council	The LGO will issue a public report and is likely to determine that the Council has maladministered the process and decision	This is likely to be unavoidable but all advice that the Council has received (DFE and external Counsel) supports the Council view that the policy is compliant to the statutory guidance	C2

6. Financial implications

6.1 There are financial implications associated with all options:

6.2 **In relation to option A** there are potentially significant additional ongoing costs in funding additional children who would be assessed as eligible for free travel assistance should the LGO recommendations be implemented. Officers have undertaken an analysis of the transport arrangements for the 2017/18 academic year and determined that if an additional 15% of children were to be eligible; this would lead to an additional cost of approximately £50,000. If an additional 50% of children were to be eligible this would lead to an increase in cost of approximately £166,000 and 100% would lead to approximately an additional £330,000 per annum. This additional cost would be recurring for the career of the pupil or until and if, they move school. It will also bring similar costs annually for each new cohort of children being assessed.

6.3 **In relation to option B** there is a potentially significant cost to pursuing a Judicial Review associated with the legal costs.

6.4 **In relation to option C** there would be associated costs to any challenges submitted to the Council from families who feel that they have been disadvantaged by the travel assistance decisions, in light of the findings of the LGO.

7. Legal implications

7.1 *In regard to option A:*

There are no significant **legal** implications in pursuing this option, as we would be changing the Council view to agree with that of the LGO. The full constitutional and legal process in relation to determining a change to the Council policy would need to be strictly followed. The implications will be on financial resources as set out in paragraph 6.1 above.

7.2 *In regard to options B and C:*

Officers are confident that the Medway Council Education Travel Assistance Policy is compliant with the statutory guidance and the advice received both from the DfE and external Counsel supports this position. It is important, however, to take into account in decision making the potential ramifications for the Council in continuing to challenge the LGO decision and recommendations. These risks are highlighted in section 5 above.

7.3 The advice of the Council's Chief Legal Officer in relation to the powers of the Local Government Ombudsman (LGO) and the Council's responsibilities is that:

- The LGO does not have legal powers to make councils carry out their recommendations.
- Where a council does not agree to a settlement proposed by the LGO, they will issue a formal public interest report (which was published on 16 May 2019 in this case) and the Council must make this available to the public and advertise in the local press regarding the report (which has been undertaken), as well as submitting a report to Cabinet (this report).
- Where Cabinet does not agree to carry out the recommendations in the report, the LGO will issue a further report which would have to be considered by Cabinet, after which (if the Council still does not accept the LGO's recommendations), the Council must publish in the local press explaining why it has refused to follow the LGO recommendations.

8. Recommendations

8.1 Cabinet is asked to confirm they approve the continued use and application of the current Education Travel Assistance Policy in the event of the issues raised by the LGO (option C).

8.2 Cabinet is also recommended to authorise the Director of People - Children and Adults Services to write to the Local Government Association (LGA) to take on this matter as a sector wide issue (due to the differing manner in which each Local Authority interprets the DfE Statutory Guidance).

9. Suggested reasons for decision(s)

9.1 The reason for this recommendation is that officers are of the view that the Medway Council's Education Travel Assistance Policy is compliant with the DfE statutory guidance. All independent advice received from the DfE and external Counsel supports this view.

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Appendices

Appendix 1 - Education Travel Assistance Policy

Background papers

Local Government Ombudsman report case no. 17 015 628 and associated article
<https://www.lgo.org.uk/decisions/education/school-transport/17-015-628>
<https://www.lgo.org.uk/information-centre/news/2019/may/medway-council-criticised-for-not-reviewing-school-transport-policy-properly>