

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

**Investigation into a complaint against
Nottingham City Council
(reference number: 17 003 146)**

17 May 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, or another body in jurisdiction, to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Investigation into complaint number 17 003 146 against Nottingham City Council

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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

Mrs D – the complainant

Report summary

Education and Children's Services - Education Appeal Panel: School admissions

Mrs D applied for a place in Year Five for her son at a school, which was outside their catchment area. She was a victim of 'honour'-based violence and wanted her son to attend a school that no other family members attended.

The Council refused the application because the school was full. Mrs D decided to appeal the Council's decision not to give her son a place by going to an independent appeals panel. The purpose of an appeals panel is to consider whether the prejudice caused to the child by not attending a school outweighs the prejudice caused to the school by having an additional pupil.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused, the Council should:

- apologise to Mrs D;
- arrange a fresh Year Five appeal for Mrs D with a new panel, clerk and presenting officer; and,
- ensure that appeal personnel are properly trained and understand their legal role including their functions as set out in the School Admission Appeals Code (2012). The Council should tell us when it has conducted this training and confirm that all appeal personnel have attended.

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*)

Introduction

1. Mrs D applied for a place in Year Five for her son at a school, which was outside their catchment area. She was a victim of 'honour'-based violence and wanted her son to attend a school that no other family members attended.
2. The Council refused the application because the school was full. Mrs D decided to appeal the Council's decision not to give her son a place.

Legal and administrative background

3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we use the word fault to refer to these. We cannot question whether an independent school admission appeals panel's decision is right or wrong simply because the complainant disagrees with it. We must consider if there was fault in the way the decision was reached. If we find fault, which calls into question the panel's decision, we may ask for a new appeal hearing. (*Local Government Act 1974, section 34(3), as amended*)
4. The School Admission Appeals Code (2012) is statutory guidance setting out how appeals for schools should be considered.

How we considered this complaint

5. We produced this report after examining relevant files and documents. We rely on the clerk's notes as a formal record of the hearing. The School Admission Appeals Code (2012) specifies the clerk 'must ensure an accurate record is taken of the points raised at the hearing, including the proceedings, attendance, voting and reasons for decisions'. Officer X was also asked to give written views on the matters complained of and these have been considered and quoted from where appropriate.
6. We have shared several drafts with the complainant and the Council and invited their comments. The comments received were taken into account before the report was finalised.

Investigation

What should happen

General requirements for admission appeal hearings

7. Admission appeals are governed by the School Admission Appeals Code (2012) ('The Code'). The Code sets out how appeals should be managed. The Code says; 'Appeal panels perform a judicial function and must be transparent, accessible, independent and impartial, and operate according to principles of natural justice'.
8. The Code emphasises that admissions authorities must ensure that panel members, clerks and chairs, along with presenting officers, are properly trained and understand their duties.

Conduct of an appeal

9. The Code says that, at the start of an appeal, 'The chair introduce(es) the parties and explain(s) the roles of the clerk and the panel, explaining how the hearing will be conducted, and ensuring that the parties have sufficient opportunity to state their case and ask questions'.
10. Appeals are heard in two stages. The appeals panel is first asked to consider 'whether the admission arrangements...complied with the mandatory requirements of the School Admissions Code and Part 3 of the School Standards and Framework Act 1998' and also whether they were correctly and impartially applied in the complainant's case. The panel then has to decide whether 'the admission of additional children would prejudice the provision of efficient education or the efficient use of resources'. Panel members have to satisfy themselves on this point by asking questions and rigorously examining the school's case.
11. The admission authority moves to the second stage of an appeal if it is satisfied the school is full. The Code explains that this stage is where; 'The panel must balance the prejudice to the school against the appellant's case for the child to be admitted to the school. It must take into account the appellant's reasons for expressing a preference for the school, including what that school can offer the child that the allocated or other schools cannot. If the panel considers that the appellant's case outweighs the prejudice to the school it must uphold the appeal'. The presenting officer must 'present the decision not to admit the child and...answer detailed questions about the case being heard and about the school', asking questions about the case if they wish to do so. Although, by the time of the second stage, the panel is aware the school is full, 'the admission authority must be able to demonstrate prejudice over and above the fact that the published admission number has already been reached'.
12. The Code holds that 'each side must be given the opportunity to state their case without unreasonable interruption'.

What did happen

First stage of the appeal

13. At the first stage of the appeal, the panel decided the admission arrangements complied with the law. It decided they did so, in this case, as admissions had been prioritised according to the Council's policy. Mrs D's son had not been given a place as there were none available after children with a higher priority had been admitted. The panel then had to decide if the school was full or whether other children could be admitted without having any negative impact on the education of other children already at the school.
14. This first stage was somewhat brief with limited questions on the part of the Chair and panel but the school's case was clear. The panel decided the school was full and another child having a place would 'prejudice the provision of efficient education or the efficient

use of resources'. On the balance of probabilities, we consider the panel had sufficient evidence to make this decision and there is no evidence of fault in it doing so.

Second stage

15. According to the Clerk's notes, at the start of Stage Two, the Chair confirmed the panel had read all the paperwork given in evidence. Evidence of the need for a change of school for the child had been provided, amongst others, by the school the child attended, the police, two Child and Adolescent Mental Health Service (CAMHS) practitioners and a consultant paediatrician. The Chair commented 'it would be helpful if (Officer X) puts questions to you to help with (the) case. Add anything you want (to)'.
16. In accordance with the Code, Mrs D should have had an opportunity to state her case but she did not. She agreed with the Chair that questioning by Officer X might be 'helpful' because she was unaware of how the questioning would proceed. The Council disagrees with this. It says Mrs D had the opportunity to verbally add to 'the substantial amount of written evidence she had submitted and that she consented to begin taking questions from Officer X'.
17. Officer X's questioning was more in the form of a cross-examination centring on why Mrs D believed there were no members of the extended family at the school. Questions were posed and then re-stated in different ways in what we consider to be an adversarial approach. Neither the clerk nor the panel members considered the questioning was inappropriate or adversarial. They said they would have intervened if any party behaved inappropriately but they did not feel it necessary in this case. The Council's view is that 'relying on the (clerk's) notes does not provide...an accurate representation of the clerk and panel's perspective on whether the questioning was adversarial'. However, there should be no need to repeat questions if an answer is given (as is detailed below).
18. Officer X's view, expressed in comments on the draft decision, was that the written case submitted by the complainant was inaccurate. Officer X felt Mrs D sought to deceive the panel and had sought to deceive the panel in previous appeals. This is why questions were asked in this way.
19. The main focus was on why Mrs D had chosen this school rather than any others. According to the clerk's notes, the questioning started with 'How do you know (this school) doesn't have family in?'. Mrs D said she had looked at all schools and knew there was no one in the family attending, at least at present. Further, the Council had already acknowledged that no other family members attended the school in a letter it had written to her on 26 October 2016.
20. Again, according to the clerk's notes, this question was rephrased that it was 'difficult to understand how you know (there are no family members present) when situations change frequently so how would you know?'. This was repeated later; 'How do you know they're (sic) (family members) not attending when you know they do attend other schools' and 'Most applications (to the school) come from (x) catchments so they could be there'. Mrs D was applying to this school as the only school that could meet her son's needs on the grounds it had no family members attending. Our view is that the way the facts were established was adversarial. The Chair did not step in. This is fault.

21. Although the clerk's notes say Mrs D was given the opportunity, by the Chair, to detail 'anything we've not covered that we need to discuss' and then to sum up, by this time she says she felt ill and had clearly been distressed at times through the hearing. This is clear from the clerk's notes. She did mention her and her husband's illnesses and also about her child being ill. This was acknowledged by the hearing and is in the clerk's notes. The Council says that given Mrs D did not appear to be overly distressed and did not inform the panel or the clerk of her emotional state, the Council says the panel acted appropriately in allowing the hearing to continue, particularly because the panel did not consider the questioning to be inappropriate.
22. Mrs D thought the panel, the Chair and the presenting officer had been able to speak together in private. There is no evidence of this.
23. Mrs D was given a decision letter, which set out the case she had made. She does not think all the evidence in there was 'considered' but we would not expect every issue to be explored in depth at the hearing.

Conclusions

24. We are concerned by the way this appeal was managed and run. In accordance with the Code, it does not accord with the principles of natural justice to question a parent in an adversarial way. Officer X commented; 'This (questioning) was done with sensitivity and proportionately' but, on the balance of probabilities, we disagree that the questioning was 'sensitive' and 'proportionate' in this case. It is not for Officer X to 'prove' a case is wrong – it is for the panel to consider whether the prejudice to the child outweighs the prejudice to the school. Officer X, in comments to us, continued that 'The parent had not been truthful at times (and) I had a duty to bring this to the attention of the panel'. It was not for Officer X to make any decision on the appellant's 'truthfulness' and convey that to the panel. It is also not necessary for questions to be repeated in case another answer is elicited. Having weighed the evidence, on balance, we are satisfied that, on this occasion, the questioning was not appropriate for a school admission appeal. This is fault and in our view it is sufficient to undermine confidence in the fairness of the process.
25. It is fault that the panel were provided with information about the character and history of the appellant that was not relevant to the matter under consideration. In written comments on the draft decision, Officer X told the investigator; 'The questions were carefully posed to parent so the panel who are **hearing** the appeal were able to understand from the answers given by parent that they differ to events and points raised in the written case. Parent has told many untruths throughout a number of appeals and conversations and it is within the boundaries of natural justice to ensure the panel are not able to be purposely misled'. Even if that is the Council's view, the parent should still be able to state their case so the panel can consider it on its own merits. Not to allow this is fault. It is not necessary for the panel to know what the Council thinks of the complainant's character and history of appeals and, indeed, it jeopardises its impartiality if it does. This is because the panel's view of the appeal may be prejudiced or they might take account of information that does not directly relate to the appeal being heard.

26. There was fault in the way this panel was run primarily in relation to the adversarial questioning. We consider, on balance, this resulted in the appellant not receiving a fair hearing. We have invited the Council to offer a fresh appeal, but it has, so far, declined to do this.

Decision

27. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mrs D.

Recommendations

28. To remedy the injustice caused, the Council should:

- apologise to Mrs D;
- arrange a fresh Year Five appeal for Mrs D with a new panel, clerk and presenting officer; and,
- ensure that appeal personnel are properly trained and understand their legal role including their functions as set out in the School Admission Appeals Code (2012). The Council should tell us when it has conducted this training and confirm that all appeal personnel have attended.

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