

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

**Investigation into a complaint against
Leicester City Council
(reference number: 18 010 117)**

4 June 2019

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

Miss X	The complainant
Y	Her son
Officer A	A Council officer
Officer B	A Council officer

Report summary

School attendance

Miss X complains the Council did not have good reason to ask her to prove the education she was providing for her son, Y was suitable. Although it would in due course have sought to visit anyway, it made its first request based on information that was wrong, and continued to ask for proof even when the actual allegation gave no reason to pursue the matter. This went on for more than six months. The Council threatened to issue a school attendance order against Miss X and maintained its position despite our warnings that its action had no basis. Miss X could have prevented the Council continuing its course by giving it the evidence she showed us. But the Council's actions in asking for proof would still have caused her frustration in having to justify her actions when the basis for its request was the allegation that gave no reason for concern. Its actions have also left Miss X with an understandable loss of trust in the Council.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused by fault, we recommend the Council takes the following action immediately:

- ceases its action against Miss X based on the referral received at 2.57pm on 12 July 2018 (this does not preclude the Council's right to request a routine visit, not based on this referral, in accordance with its elective home education policy).

We recommend that within a month of the date of this report the Council:

- apologises to Miss X for having based its actions on a referral that did not justify those actions, and for failing to tell her what had been alleged against Y, causing her frustration and a loss of confidence in the Council; and
- reminds staff that what is recorded about parents should be factual and non-judgmental.

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*)

The complaint

1. The complainant, whom we shall call Miss X, complains that the Council required her to provide details of her son, Y's home education without good reason to believe this was inadequate and when she declined to do so, sought to force her to accept a school place.

Legal and administrative background

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*)
3. 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.
4. The Education Act 1996 (the Act) states at s.7 that parents must ensure their children receive "efficient full-time education" that is "suitable" for their "age, ability and aptitude". This must be done "either by regular attendance at school or otherwise". Parents may choose to educate their children at home. This is known as elective home education (EHE).
5. The Act (as amended by the Education and Inspections Act 2006) states at s.436A that local authorities must identify children in their area of compulsory school age who are not receiving "suitable education".
6. In doing so, councils must have regard to statutory guidance issued by the Secretary of State. *Revised statutory guidance for local authorities in England to identify children not receiving a suitable education*, was issued by the (then) Department for Children, Schools and Families (DCSF) in January 2009. Paragraph 87 says,

"Section 436A of the Education Act 1996 requires local authorities to make arrangements to establish (so far as it is possible to do so) the identities of children who are not pupils at schools and who are not otherwise receiving suitable education. In order to comply with this duty local authorities need to make arrangements which will as far as possible enable them to determine whether any children who are not pupils at schools, such as those being educated at home, are receiving suitable education. In order to do this local authorities should make enquiries with parents educating children at home about the educational provision being made for them. The procedures to be followed with respect to such investigations are set out in the EHE Guidelines, 2.7-2.11 and 3.4 -3.6."
7. Confusingly, the EHE Guidelines (*Elective Home Education, Guidelines for Local Authorities* issued by the DCSF in 2007 and 2013) say at paragraph 2.6 that the duty under s.436A to identify children not receiving education does not apply to children who are being educated at home. The EHE Guidelines are not, however, statutory guidance issued by the Secretary of State.
8. The EHE Guidelines say,

"Contact with parents and children

3.4 Local authorities should acknowledge that learning takes place in a wide variety of environments and not only in the home. However, if it appears that a suitable education is not being provided, the local authority should seek to gather any relevant information that will assist them in reaching a properly informed judgement. This should include seeking from the parents any further information that they wish to provide which explains how they are providing a suitable education. Parents should be given the opportunity to address any specific concerns that the authority has. The child should also be given the opportunity, but not required, to attend any meeting that may be arranged or invited to express his or her views in some other way. Parents are under no duty to respond to such requests for information or a meeting, but it would be sensible for them to do so.

3.5 If it appears to a local authority that a child is not receiving a suitable education it may wish to contact the parents to discuss their ongoing home education provision. Contact should normally be made in writing to the parents to request further information. A written report should be made after such contact and copied to the parents stating whether the authority has any concerns about the education provision and specifying what these are, to give the child's parents an opportunity to address them. Where concerns about the suitability of the education being provided for the child have been identified, more frequent contact may be required while those concerns are being addressed. Where concerns merit frequent contact, the authority should discuss them with the child's parents, with a view to helping them provide a suitable education that meets the best interests of the child.

3.6 Some parents may welcome the opportunity to discuss the provision that they are making for the child's education during a home visit but parents are not legally required to give the local authority access to their home. They may choose to meet a local authority representative at a mutually convenient and neutral location instead, with or without the child being present, or choose not to meet at all. Where a parent elects not to allow access to their home or their child, this does not of itself constitute a ground for concern about the education provision being made. Where local authorities are not able to visit homes, they should, in the vast majority of cases, be able to discuss and evaluate the parents' educational provision by alternative means. If they choose not to meet, parents may be asked to provide evidence that they are providing a suitable education. If a local authority asks parents for information they are under no duty to comply although it would be sensible for them to do so. Parents might prefer, for example, to write a report, provide samples of work, have their educational provision endorsed by a third party (such as an independent home tutor) or provide evidence in some other appropriate form.”

9. There is a formal process councils may follow if these attempts to establish whether a child is receiving suitable education fail. This is set out in s.437 of the Education Act 1996. A council may issue a notice requiring a parent to provide evidence a child is receiving suitable education. If the parent fails to satisfy the council, it may issue a school attendance order after 15 days requiring the parent to enrol the child at a named school. Councils can prosecute parents who do not comply with a school attendance order.
10. The Council has a policy for EHE. The version we have seen is 6.0, revised in August 2016. This states at Section 3, “*Within 4 weeks of the notification [of the start of EHE] by the Education Welfare Service, the EHE Adviser will contact the parent to offer opportunities for the family to discuss their education provision. This can take the form of a home visit where education takes place or at a neutral*

location such as a library. It could take the form of written report from the family and possible work samples. Such a face to face contact is not required but it is sensible for parents to choose this way of engaging.”

11. The Council’s policy continues, *“There are no set hours, days or weeks when education has to take place and no requirements for formal lessons. Parents are not required to follow a school model of education, follow school hours or complete work in books.”*

How we considered this complaint

12. We have produced this report after examining the relevant files and documents provided by both parties. Both parties have had the opportunity to comment on a draft of this report and we have considered their comments.

What we found

13. In February 2018, Miss X elected to educate her son, Y at home after he was bullied at his school (School 1). She has provided us with evidence of the education Y is receiving.
14. In April 2018, an officer from the Education Welfare Service (Officer A) visited Miss X at home. We have not seen any evidence that the Council felt the education she was providing was unsuitable or that frequent contact was required. The correspondence the Council provided in response to our enquiries did not show any contact with Miss X between April and July 2018.
15. In its response to our draft report, the Council told us there would have been a routine visit anyway by a second officer. Its policy for EHE confirms this. This officer was Officer B. The Council told us that these visits were running late in the summer of 2018. It says Officer A passed on Miss X’s case on 30 April 2018 for a routine visit. It said a referral from a neighbouring council in early July 2018 hastened the need to visit.
16. We have seen the neighbouring council’s email to the Council. This said a school in its area had reported that Y had been “harassing two of their students both outside of school and also during the school day”. The referral quoted the school as saying Y “doesn’t go to school”. It did not give the name of the school.
17. Officer B wrote to Miss X on 5 July 2018 saying it was part of her role to discuss the education Y was receiving and she wanted to visit at 2.30pm on 10 July 2018. This was a short, standard letter. This letter did not say there had been any report that Y was not receiving suitable education.
18. Miss X emailed Officer B on the evening of 9 July 2018, saying she had received the letter from her when she came in from work. She said the next day was too short notice and declined to meet.
19. On 10 July 2018, Officer B emailed Officer A about Miss X as she had visited in April. Officer A replied to Officer B’s email, giving her opinion of Miss X. She said, *“As far as I can remember, she seemed like an insecure mother, who likes to keep herself to herself and doesn’t have much of a social life by way of friendships or support network.”*
20. The email went on, *“I believe she says the right things and agrees with what is being suggested but doesn’t have the intention to follow through.”*

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21. The email did not contain any evidence that Miss X had failed to “follow through” and did not state there had been any need for action by the Council in April 2018. The Council maintains this email had no impact on the action that followed. In its response to our draft report, it said there was evidence on the file that Miss X had failed to follow through intended actions. It has not provided any such evidence.
 22. Officer B responded on 10 July 2018. In this email, she told Miss X, *“I received a complaint from [School 1] via [the neighbouring council] that [Y] was making nuisance of himself around the school, during school hours and at the end of the school day.”*
 23. She went on that this created the need to visit before the end of term as she needed to check he was receiving suitable education. She said that she only worked in term times and had little time left. The school term in the Council’s area would end on 12 July 2018. She proposed visiting on 12 July.
 24. The referral had not come from School 1.
 25. We do not have any evidence that Officer B knew this was wrong on 10 July 2018.
 26. Miss X says Y would be unlikely to have returned to School 1 as he had been severely bullied there, which is why she had chosen to educate him at home.
 27. The email exchanges continued. Miss X told Officer B at 11.27am on 11 July 2018 that she had picked up two voicemail messages from her on 3 July 2018, but had not thought there was a problem. She said she did not see any problem with Y going out during the day. She said that while she would consider any specific issues, she was not required to stick to standard school day timings in educating Y.
 28. Officer B told Miss X at 11.34am on 11 July 2018 that the neighbouring council had contacted her. She said it had told her that Y, *“had been causing concern as he had been contacting two students both outside the school and also during the school day. He had apparently left to move to [a town] but has been seen in [a place] and not attending school.”*
 29. Officer B ended the email by saying she would not be available from the next day, but hoped to be in touch in September.
 30. At 12.03pm on 12 July 2018, Officer B emailed Miss X again. She said she had spoken to the neighbouring council earlier that morning. She said she had found out the referral had come from School 2, not School 1. She said she hadn’t got full details as the member of staff who had reported matters was teaching until 4pm on the last day of term. She apologised for the misinformation.
 31. School 2 is several miles from Miss X’s home. She says it would have taken Y at least an hour to get there by public transport and it would have been too dangerous to cycle along a main road. She says he was never away from home long enough to allow him to do this.
 32. Miss X emailed back at 2.56pm. She said, *“It appears you may be contacting the wrong family as, apart from the name [Y] these details do not seem relevant to us.”*
 33. She told Officer B she expected to be given the time, date and evidence of the incident that day and could not wait until September to deal with any problems there might have been.

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34. At 2.57pm on 12 July 2018, the teacher at School 2 who made the original referral emailed Officer B. We have agreed not to disclose the text, but the points he made were, in summary, that:
- Y had not been to School 2;
 - Y had contacted pupils at School 2 by social media and by meeting them in a village;
 - the incident that sparked matters off happened at a weekend;
 - Y had claimed he was living in a town and visiting his grandmother;
 - Y had claimed he did not attend school anywhere; and
 - Y had tried many times to call a pupil at School 2.
35. On 4 September 2018, Officer B emailed Miss X again. Miss X had asked her to send a copy of the email from School 2. Officer B declined to do so as the data was the property of the person who sent it. She also said she had a duty to discuss Y's education with Miss X to satisfy herself it was suitable. She attached a standard form for Miss X to fill in about Y's education.
36. Miss X complained to the Council on 4 September 2018 that it had failed to give her details of what was alleged after the earlier factual error in naming the wrong school.
37. On 18 September 2018, the Council apologised for the initial error on 10 July 2018, saying Officer B had been trying to clear things up before she went on leave.
38. Officer B wrote to Miss X on 28 September 2018 to say she had not received any information from her about Y's education. She said she had referred the case to the Education Welfare Service for investigation. The referral stated, "the education provided for [Y] is unsuitable." By this time, Miss X had complained to us about the Council's actions.
39. On 15 October 2018, Officer A wrote to Miss X. Miss X told us the letter was hand-delivered. In the letter, Officer A said Y's education was unsuitable and asked to visit on 18 October 2018. She enclosed a second letter telling Miss X it was "essential" she registered him at a school. This letter stated that if Miss X did not do this by 29 October 2018, the Council would allocate him a place via a Fair Access Panel. These panels are groups representing schools in each council's area that find places for children who are out of education.
40. According to a later letter, the Council served a notice on Miss X on 8 November 2018 telling her she had failed to satisfy it that Y was receiving a suitable education.
41. In response to our enquiries, the Council told us on 27 November 2018 that it remained of the view that Y might not be receiving a suitable education. It said it had a duty to establish the names of children in its area not receiving a suitable education. It supplied a copy of the referral from School 2 in confidence.
42. We spoke to Miss X on 6 December 2018, giving her a verbal summary of what School 2 had said, though not a copy of the full text. She had not previously been aware of the points made by School 2.
43. We also telephoned the Council on 6 December 2018. We said we were concerned the content of School 2's referral did not seem to support the view that Y was missing from education. We said that a child attending a school could have

done any of the things alleged against Y. We said that his non-attendance at school was not an issue because he was home-educated.

44. The Council wrote to Miss X on 18 December 2018. In its letter, it named a school and told Miss X it would issue a school attendance order if she did not arrange for him to attend there or a suitable alternative. It gave her 15 days to comply.
45. On 21 December 2018, we telephoned the Council again and emailed it to confirm our position. We again told it the referral from School 2 did not seem to support its actions.
46. The Council wrote to us on 4 January 2019. It referred to its duties under s.437 of the Education Act 1996 and maintained the information from School 2 had heightened its desire to undertake checks on Y's education. It said the courts had held that a mere assertion of suitable education made by a parent without evidence was not enough. It also referred to what it said was the unsatisfactory state of the law. It said that while there had not yet been any change in the law, it had acted properly. We note the Government issued new guidance on elective home education on 2 April 2019. This has no impact on our findings.
47. We wrote to the Council on 7 January 2019, confirming our position that the basis on which it had asked for information from Miss X was flawed.
48. The Council remains of the view that its actions were justified and were not based on the referral as a visit would have been carried out in due course even without the referral.

Conclusions

49. The Council was entitled to visit Miss X in April 2018. This was in accordance with its own EHE policy. It was also in accordance with the Education Act 1996. Despite the inconsistency between the government's EHE Guidelines and the Act, the latter has primacy.
50. We recognise that the Council would have been entitled to ask to visit Miss X again according to its policy. It should have made this clear, particularly when it became clear the referral did not suggest Y's education was unsuitable.
51. But we do not find that it visited for this routine reason. Apart from the short standard letter of 5 July 2018, all other correspondence shows the reason for the intended visit, as communicated to Miss X, was a result of the referral, which the Council at first misunderstood.
52. Even when the Council was aware of the correct facts of the referral, these did not provide any grounds to suspect Y's education was unsuitable. We have not seen any evidence the Council felt between April and July 2018 that the education provided by Miss X might be unsuitable, and there is no correspondence about the matter between April and July 2018.
53. We find the Council first contacted Miss X in July 2018 based on a second-hand referral it had not checked properly. This was at least in part because Officer B was rushing to complete tasks before she went on leave. Making contact without checking the facts was fault. The Council has apologised for this.
54. The Council is correct that it would be entitled to require evidence from Miss X about the suitability of Y's education if it appeared from the referral that it might be unsuitable. What the Council believed on 10 July 2018 might have justified this if it had been correct. But it was factually wrong. Y had not been to School 1. The

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- referral had come from School 2, not School 1. And Y had not been to School 2 either.
55. Although the Council says the email exchange between Officer A and Officer B on 10 July 2018 did not have any effect on the actions taken, we disagree. We note here that the Council has accepted the comments made were subjective and has agreed to remind officers that what they write in emails should be factual and non-judgmental.
 56. The email School 2 sent to Officer B at 2.57pm on 12 July 2018 did not justify a view that Y was not receiving suitable education. We will deal with its content point by point.
 57. First, the email stated that School 2 had not earlier said Y had been to its site. Officer B had already confirmed to Miss X that the earlier account she had given that he had visited School 1 was wrong. So, there was no basis to say he had been outside either school during school time. The Council's policy also confirms that home educators do not have to keep the same hours as schools, so children may be outside the home at times when other children are in school.
 58. Second, the report said Y was contacting pupils of School 2 by social media and in a village. Any school pupil can do this. So, there was no reason to assume he was out of education.
 59. Third, the report said the incident that sparked matters off happened at a weekend. Saturdays and Sundays are not school days. So again, there is no reason to assume he was missing education. A child attending a school full-time would not have been missing education either.
 60. Fourth, the report said Y had claimed to be living in a town and visiting his grandmother. The Council already knew, however, that he lived with Miss X. So, there is no reason to assume he was out of education.
 61. Fifth, the report said Y had claimed he did not attend school anywhere. But the Council knew he was home-educated and did not therefore attend a school. This did not give reason to assume he was missing education.
 62. Lastly, the report said a pupil of School 2 had received a lot of missed calls from Y during school hours. Pupils at one school can send texts and make calls to pupils in other schools during the school day. This happens both with school permission and without it as all pupils cannot always be closely supervised, particularly during breaks and lunchtimes. Moreover, breaks and lunchtimes are not standardised among schools. So, any school pupil could have done the same as School 2 reported Y had done. And home-educated children do not have to be educated at the same times as pupils in schools. Therefore, there is no reason to assume Y was missing education.
 63. When the new school term started in September 2018, the facts were clear and Officer B would have seen them. For all the reasons given above, it should not have appeared to the Council that Y was missing from education. Instead, the facts suggested a possible disciplinary issue that might have applied equally to any school pupil. The only exception to that was the point about not attending a school, but the Council already knew why Y was not attending a school.
 64. At this stage, the Council should have answered Miss X's questions about the facts of the referral from School 2. It should also have explained that, even though it now knew they did not give any reason to check Y's education, a check would be routinely due and that it was, in effect, starting the matter afresh.

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65. Instead, while it apologised for the initial error (referring to School 1) caused by lack of time, it refused to give Miss X details of what had been alleged by School 2. And it continued to ask her for evidence of suitable education without breaking the linkage to the referral from School 2. It is not surprising that she took the view that the Council was continuing to pursue a matter linked to School 2 for which there was no evidence. The correspondence we have seen leads us to the same view.
66. We are concerned the Council has maintained its position that there was no causal link between the referral and its subsequent actions even though we have questioned the basis of these actions more than once after seeing the evidence. In our view, the email Officer A sent Officer B on 10 July 2018, the failure of Officer B to check facts before asking to visit, and Officer B's failure to break the link to the referral from School 2, lead us, on the balance of probabilities, to find the Council sought to make the facts fit its view of Miss X.
67. We are also concerned that the Council has sought to justify its actions based on an anticipated change in government guidance. Acts based on expectations of future regulations are fault. In this case, the Council acted almost nine months in advance of new guidance. And this new guidance does not authorise any approach based on factually incorrect information.
68. It is correct that Miss X could have provided the Council with the same materials she has sent us. It might have been wise for her to do so, as this would have shown the work Y is doing and removed any basis for further action by the Council, thereby limiting her injustice. But that does not mean the Council had a reason to suspect Y was not receiving suitable education and to require evidence.
69. We find that, notwithstanding the previous paragraph, the faults identified caused Miss X injustice in the form of frustration and loss of confidence in the Council.

Recommendations

70. To remedy the injustice caused by fault, we recommend the Council takes the following action immediately:
- ceases its action against Miss X based on the referral received from School 2 at 2.57pm on 12 July 2018 (this does not preclude the Council's right to request a routine visit, not based on this referral, in accordance with its EHE policy).
71. We recommend that within a month of the date of this report the Council:
- apologises to Miss X for having based its actions on a referral that did not justify those actions, and for failing to tell her what had been alleged against Y, causing her frustration and a loss of confidence in the Council; and
 - reminds staff that what is recorded about parents should be factual and non-judgmental.
72. 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*)