

Report by the Local Government Ombudsman

Investigation into a complaint against Barnsley Metropolitan Borough Council (Reference number: 15 005 297)

20 June 2016

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.

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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

Miss B – the complainant

C – the complainant’s daughter

Schools 1, 2 and 3 – the complainant’s first, second and third preference schools

Report summary

School Admission Appeal

Miss B complains that there was fault in the way the independent appeals panel considered her daughter's appeal for a place in the Reception Year at School 1.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council should offer a fresh appeal with a new panel and clerk to Miss B and the other three appellants.

In addition, we recommend that the Council should:

- remind panel members and clerks that appellants must be given an opportunity to put their individual cases to the panel;
- remind panel members and clerks that panels must consider appellants' individual cases when considering the reasonableness of the admissions authority's decision to refuse a place;
- ensure that, although panels are limited in what they may take into account, appellants are told that they may put forward any evidence they may wish in support of their appeals;
- update its procedure documents to reflect the above; and
- arrange any appropriate training.

The Council has agreed to these recommendations. Miss B was offered a fresh appeal, but chose not to pursue this as her daughter is now settled in school. However, we are issuing this report in the wider public interest.

Introduction

1. Miss B complains that there was fault in the way the independent appeals panel considered her daughter's appeal for a place in the Reception Year at School 1.
2. She says it was not made clear to her or to the other parents present that they could put their cases individually to the panel. The panel then refused her appeal without considering her individual case. She therefore does not consider that she was given a fair hearing.

Legal and administrative background

The Ombudsman's role and powers

3. The Ombudsman investigates 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)***)
4. The Ombudsman may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (***Local Government Act 1974, section 26D and 34E***)

School Admissions

5. The government has issued statutory guidance to admissions authorities, in this case the Council, explaining the process they should follow when admitting children into schools. (***School Admissions Code 2012, since replaced by the School Admissions Code 2014***)
6. The guidance explains how admissions authorities should decide who to admit to the school when there are more applications than places. If a school has fewer applications than places, the admissions authority must offer applicants a place. Where there are more applications than places the oversubscription criteria will apply.
7. The law says there should be no more than 30 pupils per teacher in an infant class (i.e. in the first three years of primary school).

School Admission Appeals

8. If parents are unhappy with the offer of school they receive then they can appeal the decision at an independent appeals panel. The government has also issued statutory guidance which sets out the process for appeals. (***School Admission Appeals Code 2012***)
9. An appeals panel must consist of between three and five voluntary members of the public, at least one of whom must have an educational background. A clerk assists the panel but takes no part in the decision-making process. The clerk's role is to record the appeal and advise the panel on the law and relevant guidance.

10. When dealing with an infant class size appeal an appeals panel has to consider whether:
 - admitting another child would breach the infant class size limit;
 - the admission arrangements comply with the law;
 - the admission arrangements were correctly and impartially applied; and
 - the decision to refuse a place was one which a “reasonable” authority would have made in the circumstances.
11. In an infant class size appeal, what is “reasonable” is a high test. To uphold an appeal on grounds that it was unreasonable for the admission authority to refuse a place, the panel needs to be sure the decision to refuse a place was “perverse” or “outrageous”. For that reason panels rarely find an admission authority’s decision to be unreasonable.
12. The Ombudsman does not question the merits of decisions properly taken. The panel is entitled to come to its own judgment about the evidence it hears.

How we considered this complaint

13. We have considered the written response of the admission authority to our enquiries and the documents the admission authority provided. We have also discussed the complaint with Miss B and a Council representative.
14. The complainant, the Council and members of the independent appeals panel were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.

Investigation

What happened

15. Miss B applied for a place in the Reception Year for her daughter, C. She put three schools on C’s application. C did not get a place at School 1 or School 2, but was offered a place at School 3.
16. Miss B appealed for a place at School 1. As this was a community school, the Council made arrangements for the appeal panel hearing. Miss B attended the appeal together with the parents of three other children who were also appealing for places at School 1.
17. The clerk’s notes of the discussions show that the Council representative explained that School 1 operated with some mixed year group classes. The school would admit 40 pupils into Reception. 30 pupils would be placed in a single Reception class, while the other 10 Reception Year pupils would go into a mixed year class with 20 Year 1 pupils. There would also be nine Year 1, and 19 Year 2 pupils in each of two mixed classes.
18. The Council representative explained how the places had been allocated, and set out the Council’s case that the school was full. She explained that all the appellants had been allocated alternative places within a reasonable distance.

19. The notes show that the panel and parents were able to question the Council representative about the admissions arrangements. In particular, the panel examined the mixed class arrangements and whether additional pupils might be admitted to the Reception Year without breaching the infant class size limit.
20. The panel was satisfied that the arrangements had been properly applied. It decided that the Council's decision to refuse admission was not unreasonable. It did not go on to examine the individual appellants' cases, but refused the appeals.

Information provided to parents on the appeal process

21. The Appeals Code sets out requirements that apply to all appeals:
 - Section 2.12 *“Appeal panels must allow appellants the opportunity to appear in person and make oral representations...”*
 - Section 2.20 *“When multiple appeals are grouped, the presenting officer’s case is usually heard in the presence of all the appellants at the beginning of the hearing (or sometimes at the start of each day when a hearing runs over a number of days). The appellants’ cases are then heard individually without the presence of other appellants...”*
 - Section 2.21 *“Appeal panels must operate according to the principles of natural justice. Those most directly relevant to appeals are... b) each side must be given the opportunity to state their case without unreasonable interruption...”*
22. The Appeals Code suggests a procedure which, although not mandatory, provides for appellants to put their case to the panel without other appellants being present. This applies to both infant class size and other appeals.
23. The Council's practice is not to provide set times for private hearings. But it sets aside sufficient time for this, based on the experience of staff involved in clerking the panels. There are no time constraints on parents who want to have a private hearing.
24. The Council has explained that it does not want to deprive parents of their right to have an individual hearing. But it is under significant organisational pressure in terms of resources. Accordingly, it does not want to have officers spending time on unnecessary hearings where panels cannot take account of most of the issues that parents may raise. It also does not want to unduly raise parents' expectations when the panel's remit is limited and few infant class size appeals will succeed.
25. The Council sends letters to parents advising them of the arrangements for appeals. These letters include a reference to parents being able to have a private hearing. However, the Council acknowledges that the right to have a private hearing is not reflected clearly in its procedure documents or the agenda provided for the appeal.
26. The Council has also provided a copy of the *“script”* used by the clerk or chair of the panel to run the meeting at infant class size appeals. This says *“if there is anything you wish to say in private, then we can see you individually”*. It says this script was used at this appeal

hearing. From this, it is the Council's view that the parents were given the opportunity to have a private hearing to present their case, but chose not to.

27. One of the panel members has also expressed the view that it was made clear to parents that they could have a private hearing but feels that, having heard what the panel could consider, it is likely that the parents felt that there was little point in having an individual hearing.
28. The only reference in the clerk's notes to the conduct of the proceedings is "*procedure outlined*". There is no specific reference to parents being told that they can put their individual case to the panel.
29. Although, the appeal may well have followed the script and advised parents that they could speak, the opportunity for parents to put their case was not timetabled clearly as part of the agenda. So it would not necessarily have been clear to parents that this was a separate process from the grouped first stage in which the Council put the school's case.
30. Moreover, the script which the Council says was used at the appeal says that "*any evidence they put forward must relate to the criteria as detailed within items 5 (i), (ii) and (iii) of the procedure document*".
31. That is incorrect. Although it is for the panel to decide what evidence is relevant to its decision, parents may present any information they wish to the panel. So, if parents were wrongly advised that they were restricted in what evidence they could put forward, they could not have made a proper judgment about whether or not to have an individual hearing.
32. So, we consider that it was not made clear enough to parents that they could have an individual hearing or that they could put forward any evidence they chose in support of their appeal. This was fault.

The panel's decision

33. Section 4.4 of the Appeals Code states that, when considering an infant class size appeal, "*The panel must consider all the following matters... d) whether the decision to refuse admission was one which a reasonable admission authority would have made in the circumstances of the case*".
34. The Council explained in its response to us that: "*the Panel found no evidence to suggest there was failure to comply with legislation or codes/practices and neither was the decision found to be unreasonable. In light of this the Panel would not have therefore proceeded to examine the parental cases*".
35. But the Council's own guidance sets out how the Court of Appeal considered the question of what is "*reasonable*" in an infant class size appeal. This says that this process **must** involve consideration of the parents' particular cases in order to judge whether it was perverse to refuse the child a place.

36. Without considering the parents' individual cases, the panel could not properly consider whether the decision to refuse admission was reasonable "*in the circumstances of the case*". So none of the appellants have had their individual appeals properly considered. This was a clear breach of the appeals code and of natural justice.

Conclusions

37. We note that it was not the Council's intention to seek to deprive parents of their appeal rights. We also acknowledge that the Council advised parents what evidence they could put forward so as not to unreasonably raise their expectations.
38. But we do not consider that the procedures the Council and the panel followed comply with the Appeals Code.
- It was not made clear to parents that they could have their individual cases heard.
 - Parents were incorrectly advised as to what evidence they could put forward in support of their case.
 - The panel did not consider the parents' individual cases when deciding on the reasonableness of the decision to refuse a place.
39. So, the panel could not reach a proper decision on any of the cases.

Decision

40. There was fault by the Council causing injustice to Miss B and the other appellants. They were not given a proper hearing, and cannot know whether their appeals should have been upheld.

Recommendations

41. The Council should offer a fresh appeal with a new panel and clerk to Miss B and the other three appellants.
42. In addition, we recommend that the Council should:
- remind panel members and clerks that appellants must be given an opportunity to put their individual cases to the panel;
 - remind panel members and clerks that panels must consider appellants' individual cases when considering the reasonableness of the admissions authority's decision to refuse a place;
 - ensure that, although panels are limited in what they may take into account, appellants are told that they may put forward any evidence they may wish in support of their appeals;
 - update its procedure documents to reflect the above; and
 - arrange any appropriate training.

43. One panel member does not accept our recommendations. He considers that they will merely add cost to the appeals process and that the decisions will remain the same. It may well be that in many cases the outcome of appeals will be unchanged. But the rationale behind the recommendations is to ensure that appellants have their cases considered properly and fairly in accordance with the Appeals Code.
44. The Council has accepted our findings and has already agreed the Ombudsman's recommendations. The complainant was offered a fresh appeal, but chose not to pursue this as her daughter is now settled in school. While that is the case, we are issuing this report in the wider public interest.