

# Central Bedfordshire Council

12 October 2021

## Executive

### **The Council's Response to the Ombudsman's Report regarding the Provision of Alternative Education (Reference number: 19 018 501)**

**Report of:** Cllr Sue Clark, Deputy Leader and Executive Member for Families, Education and Children

[sue.clark@centralbedfordshire.gov.uk](mailto:sue.clark@centralbedfordshire.gov.uk)

**Responsible Director:** Sue Harrison, Director of Children's Services

[sue.harrison@centralbedfordshire.gov.uk](mailto:sue.harrison@centralbedfordshire.gov.uk)

**This report relates to a decision that is Key/Non-Key**

### **Purpose of this report**

The Council's Executive must consider the Ombudsman's report and confirm within three months the action it has taken or proposes to take in response to each of the recommendations it contains.

Executive is asked to approve the policy and approach to Alternative Education to ensure that pupils out of school for medical reasons receive appropriate suitable education, preferably full time, unless there are reasons why this would not be in the pupil's best interests.

### **RECOMMENDATIONS**

The Executive is asked to:

- 1. consider the report and approve the actions taken and proposed future actions; and**
- 2. approve the policy for pupils out of school for medical reasons (attached as background papers).**

### **Executive Summary**

1. The Ombudsman has published the outcome of their investigation into a case where a family complained that the Council did not provide alternative education for their son (B) who was unable to attend school for medical reasons since November 2018 (Reference number: 19 018 501).

2. The investigation by the Ombudsman has concluded there was fault by the Council and has made a number of recommendations.
3. The Council has accepted all the Ombudsman's recommendations and has made an apology to the family for the undue distress and damage caused by not acting quickly enough to put in place alternative education due their child's health needs.

## **Ombudsman's Recommendations**

4. Recommendation 1: CBC should place two public notices in local newspapers and/or newspaper websites within two weeks of the Ombudsman publishing the report. The report will be published on the Ombudsman website on or after 12/08/21. The Ombudsman must be notified when the council has placed these notices.

### **Action:**

- i) Appendix A details the text utilised for website and media publication
- ii) The publications were made on 12<sup>th</sup> August 2021.

5. Recommendation 2: Copies of the report should be available free of charge at one or more of the council offices. If this is difficult during the current COVID-19 restrictions the Ombudsman must be advised of appropriate alternative arrangements put in place.

### **Action:**

The report was made available on 26<sup>th</sup> August at council offices in Priory and Watling House and is currently available for the public to view.

6. Recommendation 3: The council must consider the Ombudsman 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 the Ombudsman will require evidence of this. Please do not hold this meeting or send out publicly available papers for discussion at it before the date of publication for this report, which will be on or after 12 August 2021.

### **Note:**

- i) The recommendation to consider the report is 3 months from 12<sup>th</sup> August. This recommendation will be fulfilled following at this meeting just over one month prior to the deadline of November 12<sup>th</sup> 2022.

7. Recommendation 4: The Council will apologise to the complainants for the faults the ombudsman has identified and make the following payments:
  - a. £1000 to recognise their avoidable distress over a prolonged period
  - b. £250 for their time and trouble in pursuing their complaint
  - c. £500 to be used by the complainants for their son's educational benefit, for the failure to initially take prompt and decisive action with regards to his nonattendance at school
  - d. £1,800 to be used by the complainants for their son's educational benefit, for the lack of alternative education between April and July 2019

- e. £2,500 to be used by the complainants for their son's educational benefit, for the limited home tuition between September 2019 and July 2020 (£700) and for the three-month period of when there was no alternative provision (mid-January to May 2020) (£1,800).

**Action**

- i) Payment has been made and an apology issued to parents.

- 8. Recommendation 5: In respect of alternative education procedures, the Council will: review its procedures for deciding the reasons for a pupil's non-school attendance consider having a named officer with responsibility for this and to have a clear timetable for such decisions and the action to be taken by the Council to address the problem.

**Action already taken:**

- i) A locality approach now ensures that one Assistant Director oversees safeguarding, SEND, Attendance, Children missing from education, Traveller Education, School Improvement, Jigsaw, Outreach, Virtual school.
- ii) Two heads of locality and a Chief SEND officer also have an overview of these areas as an additional safety net.
- iii) A review of the medical needs teams procedures has already taken place
- iv) New policies have been written to ensure there are clear policies and procedures (See appendices)
- v) Eligibility criteria for the medical needs team has been reviewed to include GP referral, Elective home education and private medical evidence – This broadens the remit of the service
- vi) The school buy back for school attendance officers has been removed from 1<sup>st</sup> Sept 2022. This will ensure that:
  - Schools will have a named officer to review absence
  - Schools will be required to inform their officer when a pupil has had a continuous absence of 15 days or more.
  - The access inclusion manager will lead on challenging any school decisions which do not match the DfE guidance and Education legislation.
- vii) Staff training for the medical needs team has taken place

**Action still to be taken:**

- i) CBC will make available the ombudsman's report to all schools in order they understand the joint challenge between schools and the local authority around this issue.
- ii) Officers will write to schools in the new term to request persistent absence data on a ½ termly basis.
- iii) Training around school attendance needs to take place in the autumn term 2021.
- iv) Eligibility criteria for medical needs to be place on the new local offer website.
- v) Training offered to families and schools around the eligibility criteria for medical needs

9. Recommendation 6: review and amend the Council's approach to alternative education to ensure that pupils out of school for medical reasons receive appropriate suitable education, preferably full time, unless there are reasons why this would not be in the pupil's best interests. The policy review should be ratified by the Council's relevant Committee, responsible for the oversight of educational provision in its area.

**Action already taken:**

- i) A policy and eligibility criteria have been amended
- ii) All current cases have been reviewed and hours adjusted accordingly where appropriate
- iii) The medical needs team (MNET) has further reviewed its offer to ensure each offer is bespoke
- iv) MNET teachers to offer consultancy work with schools with a focus on support and advice on reintegration

**Action to be taken:**

- i) INSET training to take place in September in respect of reviewing/recording hours of tuition and a rationale

10. Recommendation 7: ensure that its revised procedures allow medical evidence from a range of professionals and also covers cases where a child is out of school under the 'otherwise' alternative education criteria.

**Actions already taken:**

- i) LGSS Law have been asked for legal advice as to what "Otherwise" means for section 19 of the Education Act due to the broad nature of potential coverage.
- ii) Eligibility criteria have been reviewed for MNET to cover a wider range of health professionals.

**Actions to be taken:**

- i) *Following legal advice*
  - A position statement is required to identify when the LA should provide alternative education rather than a school/academy.
  - Resource implications to be identified as part of the above work.
  - Work across the region is required to secure a joint approach

11. Recommendation 8: ensure that the Council's alternative education revised policy considers its equality duties and that pupils entitled to alternative education receive this regardless of whether they are engaging in a 'treatment' plan.

**Action to be taken:**

- i) Advice to be sought from the equalities officer on this issue

12. Recommendation 9: consider increasing the Council's supply of home tuition services so that it can meet the demand for fulltime alternative education for pupils unable to attend school.

**Action already taken:**

- i) A budget has already been approved to allow for additional hours to be provided for identified young people.

**Action to be taken:**

- ii) A review of the potential need to be undertaken in order that the long term cost/impact can be evaluated
- iii) Officers to write a paper as appropriate in respect of the needs identified and potential cost implications of increasing home tuition services.

13. Recommendation 10: ensure that the Medical Needs Service provide a clear rationale for the number of hours of home tuition offered, in keeping with the educational needs of the pupil, and that this is kept under review.

**Action already taken:**

MNET has reviewed hours offered to students and will continue to do so every 6 weeks in consultation with health, school, family and the young person  
INSET training for the MNET team in September

**Action to be taken:**

MNET to record decisions in detail in 6 weekly pupil reviews,

14. Recommendation 11: invite the complainants to make suggestions about how the Council's 'Local Offer' (which provides information on its website about its services for pupils with special educational needs) could be improved.

**Actions to take:**

- i) Once the new local offer website is published, parents will be written to inviting them to comment on this.

15. Recommendation 12: review all its cases of pupils out of school (for whatever reason) since March 2019 to March 2020 (the start of lockdown) to ensure that the faults identified in this case have not occurred in other cases and, if they have, the Council should seek to remedy the injustice caused to the child without parents/carers having to make a formal complaint.

**Action already taken:**

- i) MNET has tracked through this current academic year 20/21– 19 cases were reviewed and no actions were found to be required by MNET

**Action to take:**

- i) Parameters need to be drawn up in order to ensure that CBC officers and schools understand the students we are seeking to review.
- ii) CBC will write to every school and ask them to identify pupils from March 2019 to current.
- iii) Training will be required to support schools in identifying pupils
- iv) Additional resource to be identified to work with any children identified as part of this process.

**Note:** Academies could still refuse to provide this information and support from the Regional Schools Commissioner would be required in this instance.

## **Reason for urgency**

16. The Ombudsman's report in respect of this case was published in August. The report gives a three-month timescale within which to bring this to the relevant CBC committee.

## **Council priorities**

17. This report supports Central Bedfordshire 2050 Vision, for Central Bedfordshire to 'continue to be a great place to live and work' with an education system that is truly inclusive, closes the skills gap, helps our young people into a great jobs and supports our older generations in lifelong learning.

## **Corporate Implications**

18. No corporate implications have been identified other than those already listed.

## **Legal Implications**

19. The Local Government Ombudsman was established under the Local Government Act 1974 Part 3 (LGA 74). Changes to the Act were included in the Local Government and Public Involvement in Health Act 2007 and the Health Act 2009. The LGA 74 sets out the Ombudsman's powers. Case law has further clarified how the LGA 74 should be interpreted.
20. The main statutory functions of the LGSCO are:
  - to investigate complaints against councils and some other authorities:
  - to investigate complaints about adult social care providers from people who arrange or fund their adult social care (Health Act 2009); and
  - to provide advice and guidance on good administrative practice.
21. Under sections 26(1) and 26A(1) of the LGA 1974, as amended, the LGSCO investigates complaints about 'maladministration' and 'service failure' referred to as 'fault'. They consider whether any fault has had an adverse impact on the person making the complaint referred to as 'injustice'. If there has been fault which has caused injustice they will suggest a remedy.
22. The LGA Act 1974, as amended, also specifies how the LGSCO issues decisions which is either by:
  - a statement of reasons for their decision (sections 30(1B) and (1C)); or,
  - a report (section 30(1)).
23. There are six criteria applied by the LGSCO when deciding whether to issue a public interest report which are:
  - Recurrent faults (for example, the organisation keeps making similar mistakes)
  - Significant fault, injustice or remedy (by scale or the number of people affected)
  - Non-compliance with an Ombudsman's recommendation (it has not agreed or has not carried out their recommendations)
  - A high volume of complaints about on subject

- A significant topical issue
  - Systemic problems and/or wider lessons (for example, problems with how the organisation does things that if not put right are likely to affect others, and this is an opportunity for others to learn).
24. The issue of a public interest report under section 30(1) ensures the council remains accountable to people who use its services and help to improve services for others.
  25. Section 31(2) provides that the Council has a period of three months from the date of the LGSCO's report for Members to formally consider the report and its recommendations following which a formal written response must be sent to the LGSCO explaining what steps the council has taken and will take to comply with the recommendations in the report. The report should be considered at a full Council, Cabinet/Executive or other appropriately delegated committee of elected members.
  26. Where a finding of maladministration is made the Council the Monitoring Officer has a duty to report that finding to its Members under section 5 of the Local Government and Housing Act 1989.
  27. Section 19(1) Education Act 1996: provides that:  
 "Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or **otherwise**, may not for any period receive suitable education unless such arrangements are made for them."  
 The case law around the definition of 'Otherwise' provides a broad definition and wide ranging potential responsibilities for the education of children:
  28. R v East Sussex County Council, Ex p Tandy / In re T (A Minor) [1998] 2 WLR 884: The LA is under an absolute duty to provide suitable education for children who are out of school due to illness, exclusion or otherwise. An LA may not take its own financial constraints into account when assessing what is an appropriate education.
  29. R (on the application of Y) v Croydon LBC [2015] EWHC 3033 (Admin); [2016] E.L.R. 138: The mother of a severely learning-disabled child had been unable to get him to attend school despite significant efforts. The LA refused to change the school named in the Statement or provide other alternative education. The LA was found to be in breach of its duty under s. 19 Education Act 1996 to provide suitable education; *as no further plan had been put forward, it was not reasonably practicable for the child to attend that school.*
  30. G v Westminster City Council [2004] (followed more recently in DS v Wolverhampton City Council [2017]), the Court of Appeal stated: "*It seems to us that 'otherwise', where used for the second time in [section 19, Education Act 1996], is intended to cover any situation in which it is not reasonably possible for a child to take advantage of any existing suitable schooling*".
  31. The LGO in 2016 issued guidance for councils. Failure to adhere to these could result in further ombudsman challenges.

32. Recommendation 8, until fully considered and understood could result in further legal or other challenges being brought against CBC.

## **Financial and Risk Implications**

33. Potential additional costs could be incurred as detailed in the above report, including:
- Additional resource requirements for home tuition
  - Any further implications around the definition of “Otherwise” and when an LA should step into support a young person who is out of school.

Work is currently being undertaken to identify CBC’s obligations in respect of the above and as a result it is not clear whether additional resource is required. Should the outcomes of further investigation establish that there is an additional resource requirement any immediate resource needs will be met by reallocations from within Children’s services.

## **Equalities Implications**

34. Central Bedfordshire Council has a statutory duty to promote equality of opportunity, eliminate unlawful discrimination, harassment and victimisation and foster good relations in respect of nine protected characteristics; age disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. To consider local needs and implications, an Equality Impact Assessment is being carried out in respect of the draft plan.
35. Central Bedfordshire Council has a statutory duty to ensure there are sufficient school places for children that need them. Age and disability are key considerations in respect of this duty and for the Schools for the Future programme.
36. The decision-making process, which is set out in regulation for proposals to expand Council maintained schools, requires an evaluation, on a ‘project by project’ basis, of any equalities and human rights issues that might arise.
37. The proposal is not envisaged to have an adverse impact on any of the following – sex, gender reassignment, age, disability, race and ethnicity, sexual orientation, religion or belief (or no belief), pregnancy and maternity, human rights and all other groups. Regarding age, children will have access to sufficient school places.

## **Sustainability Implications**

38. There are no sustainability implications from the above other than those identified or where further investigation is required.

## **Conclusion and next Steps**

39. Executive are asked to approve the action plan in respect of this case and also to approve the MNET policy included with the background papers.

## Appendices

### Appendix A: Public notices

#### Background Papers

- (i) New medical needs eligibility criteria  
<https://centralbedfordshire.box.com/s/naqmnx95b5uselqb025emjn6cqi001lg>
- (ii) Ombudsman's report  
<https://centralbedfordshire.box.com/s/d827bw7gmvbzogc4tz3zvin9rlllwbm4>
- (iii) Policy on Ensuring a good education for children who cannot attend school because of health needs  
<https://centralbedfordshire.box.com/s/ce8fj34emdsvcurdi7jvt35eeax10eb>

#### Report author(s):

Simon Cotton, Head of Education Inclusion Locality South/Head of School Improvement [simon.cotton@centralbedfordshire.gov.uk](mailto:simon.cotton@centralbedfordshire.gov.uk)