

**Draft report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
The London Borough of Tower Hamlets
(reference number: 19 006 122)**

**** August 2020**

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

Mrs B	The complainant
C	Her son

Draft report summary

School transport

Mrs B complains that the Council was wrong to refuse her son, C, a personalised disabled parking bay. C has autism, severe behavioural difficulties, physical problems as a result of a birth defect which cause muscle weakness, and asthma. Although he has a Blue Badge, the family frequently have to park far from their home and have great difficulty transferring C between the car and their home. This can also be very distressing for C. Mrs B says that C needs a personalised disabled bay so that they can safely transfer him between his special needs pushchair and their car.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice to C and his family, we recommend that the Council within three months:

- install a parking bay for C;
- pay the family £1,000 to reflect the significant distress and inconvenience caused as a result of the delay installing a parking bay;
- review its parking bay policy within three months having regard to how it should take into account hidden disabilities;
- once it has reviewed its policy, write to those applicants who have been refused a parking bay over the past year and inform them of the changes to its policy;
- ensure that officers are aware of the implications of an award of higher rate mobility DLA and that decisions relating to parking bay applications take into account both the exceptions in its policy and the Council's general discretion; and
- ensure that decision letters on both Blue Badge and parking bay applications contain sufficient information to enable the applicant to clearly understand the reasons for that decision.

The complaint

1. Mrs B complains that the Council was wrong to refuse her son, C, a personalised disabled parking bay. C has autism, severe behavioural difficulties, physical problems as a result of a birth defect which cause muscle weakness, and asthma. Although he has a Blue Badge, the family frequently have to park far from their home and have great difficulty transferring C between the car and their home. This can also be very distressing for C. Mrs B says that C needs a personalised disabled bay so that they can safely transfer him between his special needs pushchair and their car.

Legal and administrative background

The Ombudsman's role and powers

2. We investigate complaints of injustice caused by “*maladministration*” and “*service failure*”. I have used the word “*fault*” to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1), 26A(1) and 34(3), as amended*)

Blue Badges

3. The Blue Badge scheme was introduced by the Chronically Sick and Disabled Persons Act 1970. It allows people with disabilities to park closer to their destinations.
4. In 2014, the Department for Transport issued guidance to councils when providing Blue Badges to disabled people with severe mobility problems. The guidance provides a structured functional mobility assessment. The guidance is non-statutory, so councils are not legally obliged to adopt it. In practice, however, most councils do follow it. The 2014 guidance was replaced by new guidance with effect from August 2019. The main change was the introduction of assessment criteria to help people with severe mobility problems caused by non-visible (“*hidden*”) disabilities.
5. The guidance sets out two types of eligibility criteria for issuing Blue Badges:
 - Eligible without further assessment. This includes people over two years old and within one of several categories, including people receiving the Higher Rate of the Mobility Component of the Disability Living Allowance.
 - Eligible subject to further assessment. This includes people over two years old who fall within a range of descriptions. These include having been certified by an expert assessor as: having an enduring and substantial disability which causes then to be unable to walk; having very considerable difficulty whilst walking, which may include very considerable psychological distress; being at risk of serious harm when walking; or posing, when walking, a risk of serious harm to any other person.
6. Sections 6.9 and 6.10 of the guidance state:

“Regulation 8(3) of the 2000 Regulations states that where a local authority receives an application for a badge and refuses to issue one, it must let the applicant know in writing why their application was refused. The DfT strongly recommends that every applicant who is refused a badge should be given a detailed explanation of the grounds for refusal.”

“It is not sufficient to simply state that the applicant did not meet the eligibility criteria. The Local Government Ombudsman expects authorities to provide a clear explanation of the reasons why an application has been refused in the decision letter...”

7. The Council uses an independent disability consultancy to undertake mobility assessments based on a standard template form where points are awarded based on a range of factors as reported by the applicant or observed by the assessor.
8. An applicant needs to score 24 points to be eligible for a Blue Badge, though the form also provides space for the assessor to recommend a Blue Badge on a discretionary basis.

Personalised Disabled Bays

9. The Council may also choose to provide a personalised disabled parking bay (we refer to this in this report as a parking bay). The Council’s website explains that:

“Residents with severe disabilities may be eligible to apply for a disabled-parking bay near their home. Personalised Disabled bays may be considered in extreme circumstances for Blue Badge holders that can only walk a very short distance in a highly congested street, with no other forms of parking available.”

“Permits will generally only be issued to disabled drivers and are vehicle- and bay-specific.”

10. There is no national guidance in respect of parking bays but the Council’s eligibility criteria are set out in its Disabled Person’s Parking Policy.
11. The Council’s parking bay eligibility criteria state:

“An application may be declined if it does not meet all [the relevant] eligibility criteria.

a) The applicant must have no off-street parking space available, e.g. a driveway, a garage or a housing estate with bays that can be allocated to the applicant.

b) Parking stress in the area must be so severe that a parking space in close proximity to the applicant’s home cannot be found for a major part of most days...

d) In the case of a passenger (i.e. where the applicant cannot or does not drive), that the driver is unable to:

- park in the road to allow the applicant out; or
- push a wheelchair from the nearest available parking space, which is an unreasonable distance away.

Exceptions may be made to this criterion if:

- the applicant requires constant attendance or the driver is unable to handle required medical apparatus in addition to the applicant;
- the driver of the vehicle resides at the same address as the applicant; and
- the vehicle is used primarily for the purpose of transporting the applicant.

The Nominated Driver must live at the same address as the Applicant.”

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12. The criteria also state:

“Passengers will not normally qualify as a driver is expected to park as necessary to assist the disabled passenger to their home and move the vehicle afterwards. Although this may entail short-term obstruction of the highway, this is considered necessary and is therefore unlikely to be considered to be a contravention.”

13. As with applications for a Blue Badge, the Council uses an independent disability consultancy to undertake mobility assessments based on a standard template form. The form is the same as that for Blue Badge applications with two exceptions – the form includes a section on the use of mobility equipment but it does not include a section whereby the assessor can recommend the exercise of discretion.
14. An applicant needs to score 33 points to be eligible for a parking bay. The level was previously set at 24 points but the Council has explained that there are currently approximately 25,000 on-street parking spaces in the borough and over 6,000 Blue Badge holders. It says it would be unsupportable to provide approximately 24% of the total available on-street parking space to individual Blue Badge holders in the borough. Moreover, the Department for Transport estimates that, as a result of the recent changes to take account of hidden disabilities, the number of Blue Badge holders is likely to increase by between 6% and 30%.
15. The Council is currently undertaking a full review of its parking bay scheme to update the terms, conditions, and eligibility criteria.

Disability Living Allowance for children

16. Disability Living Allowance (DLA) is a benefit payable to children with disabilities who meet certain criteria. DLA is split into two “*components*” - mobility and care. The mobility component of DLA can be paid at two different rates – lower and higher. The higher rate mobility component of DLA (higher rate mobility DLA) gives an automatic entitlement to a Blue Badge.
17. The criteria for higher rate mobility DLA are set out in legislation. The Department for Work and Pensions and the appeal tribunals can only award higher rate mobility DLA if a child fits the criteria. They cannot issue discretionary awards.
18. There are seven ways to qualify for high rate mobility:
- 1) The child is unable to walk due to a physical disability.
 - 2) The child is deaf and blind.
 - 3) The child has no legs or feet.
 - 4) The child is blind or severely visually impaired.
 - 5) The exertion needed to walk would lead to a danger to life or serious deterioration in the child’s health. This does not apply to children whose behaviour causes danger.
 - 6) The child meets the “*severe mental impairment*” criteria.
 - 7) The child is “*virtually unable to walk*” due to a physical disability.

How we considered this complaint

19. We produced this draft report after examining the relevant documents and correspondence from the Council and the complainant. We have had discussions

with the complainant, made enquiries of the Council and considered the comments it provided in response. We have also had regard to the relevant law.

20. We have given the complainant and the Council a confidential draft of this report and invited their comments. The comments received will be taken into account before deciding whether to finalise the report.

What we found

What happened

21. Mrs B lives in a Housing Association property with her husband and their two children. Their son is of primary school age. He has physical problems causing muscle weakness as a result of a birth defect and asthma. He also has autism and severe behavioural difficulties. He has an Education, Health and Care Plan. The Housing Association has put up railings in front of Mr and Mrs B's home to keep C safe and prevent him running into the road.
22. In September 2017, Mrs B applied for a Blue Badge for C due to his behavioural problems. She explained that C sometimes refused to walk and needed to be carried and that they were awaiting a special needs pushchair for him. She explained that C also needed to be accompanied on safety grounds whenever he is out.
23. The Council arranged an independent mobility assessment for C in December 2017. The assessor observed that C was able to walk to a parked car 90m away with an almost normal gait. The assessor noted that C had not displayed physical limitations to his mobility and his other conditions did not appear to affect his mobility so as to meet the criteria for a Blue Badge. C received a score of 20, so the Council wrote to Mrs B and explained that C was ineligible for a Blue Badge.
24. Mrs B wrote to the Council again in April 2018. She explained that C was “a low-functioning autistic child”. She explained that C frequently had meltdowns, would not move, and she could not lift him and this was why he had been offered a special needs pushchair.
25. A further mobility assessment was undertaken by a different assessor. C received a score of 19 in the assessment and so did not meet the eligibility criteria in terms of mobility. However, the assessor noted the following:

“[C] has very severe autistic spectrum disorder. His behaviour at assessment was disruptive and noisy. He has no verbal communication but does shout and make loud noises. He has been provided with a major buggy by the wheelchair service for long distances and to help manage his behaviour... He was brought in the car by both parents due to his strength and difficult behaviour - he uses specialist car seat/harness. Dad had to hold securely on walking from car to waiting area. Throughout assessment he was noisy and difficult to manage... At end of assessment, he walked back to car - dad held his arm firmly – [C] did not want to walk so had to be pulled along at times and encouraged to walk in direction required - he is very much at risk as he has no awareness of danger. It does appear very difficult for mum to manage him on her own - the major buggy provision from wheelchair service does indicate the restraint needed to manage his behaviour - he is however getting too big for his buggy and this is not a long term solution. Although he does not meet mobility criteria - OT to request further consideration on discretionary basis due to behavioural/management difficulties.”

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26. The assessor emailed the Council and explained that C did not meet the mobility criteria but noted that *“the whole of the building can vouch for the difficulties experienced by the family”*. She indicated that C’s support needs were among the highest that she had seen, expressed her great empathy for the family and asked whether the Council could consider a discretionary award of a Blue Badge. The Council agreed to do so and sent a letter confirming the award of a Blue Badge.
27. In July 2018, Mrs B applied for parking bay for C. The application referred to C’s medical conditions and explained that he was unaware of dangers and ran out into the road. He needed to walk straight to the car or he would likely have a meltdown. He needed to be safe when being transferred in and out of the car and his car door needed to face the pavement. He needed to see the front door of his house or he would not get out of the car. The family also needed to be able to transport his special needs pushchair.
28. There was a delay in arranging a mobility assessment until October 2018. The parking bay assessment was then undertaken by the first assessor who had undertaken the first Blue Badge assessment. On this occasion, C received a score of 24, which would be high enough for a Blue Badge but insufficient for a parking bay. The assessor concluded that C did not meet the eligibility criteria in terms of mobility, using most of the same wording as his previous assessment.
29. Mrs B appealed the decision at the start of November. An officer contacted Mrs B and understood that C was now reliant on the use of a wheelchair. Despite further contact, Mrs B received no updates until mid-January 2019 when a parking and mobility services officer wrote to her offering a reassessment for C, on the basis of a change in circumstances, i.e. full-time wheelchair use.
30. Mrs B contacted the officer and explained that C’s use of a wheelchair was no different to his previous use of a special needs pushchair, but they had changed to a wheelchair as C now weighed 30kg. She also provided a copy of a decision made by the First Tier Tribunal of the Social Entitlement Chamber to award C higher rate mobility DLA until 2024.
31. The officer noted that the use of the wheelchair was not a change of circumstances and that Mrs B did not want a further assessment. He said that the parking bay eligibility criteria were set at a higher level than those for DLA. Accordingly, the score of 24 points from the assessment stood and C was not entitled to a disabled bay.
32. Mrs B responded at the start of February. She said that C permanently needed to use and access his wheelchair. The wheelchair was large and their car was not adapted to store and transport it. She remained of the view that C met the eligibility criteria, said that C would have a further mobility assessment if that was necessary, and asked how to escalate her concerns.
33. In February 2019, the Council undertook a Child and Carer’s Assessment in relation to holiday support for Mr and Mrs B. The Social Worker noted that:
- “[C] does not have any sense of danger...”*
- “[C] dislikes to be forced to do anything, doesn’t like being told no, or being wet or cold. When this occurs, [C] tends to bang his head in retaliation and parents then struggle to calm him down.”*
- “He has 1:1 adult support throughout the day, including break times.”*

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34. The Council considered Mrs B’s concerns as a complaint at the second stage of its procedures. The complaints officer liaised with the parking and mobility services officer to clarify the case.
35. The latter officer confirmed that the Council accepted that there was no off-street parking space available and that there was sufficient parking stress in the area to meet the eligibility criteria. He also referred to criterion (d) which applies to passengers, and stated:
- “On the face of it [C] is theoretically eligible under this criterion however the scheme is predicated on the disabled person having severe physical mobility issues, which is why we assess each applicant. C’s physical mobility assessment scored 24 out of 36, which demonstrates sufficient physical mobility not to be eligible.”*
36. The complaints officer contacted Mrs B in early March to apologise for the delay in dealing with her complaint. Mrs B reiterated the difficulties that the family had with C due to his severe behavioural problems and lack of sense of danger.
37. The complaints officer sought further clarification from the parking and mobility services officer who explained:
- “the decision as to whether a parking bay is approved or not is based solely on an applicant’s physical mobility and [C] is not the only applicant whom we have had to reject on the basis that his disability results from a mental condition rather than a physical one... Although I sympathise with Mrs [B], it would be unfair and inconsistent to change our decision in C’s case without having to reconsider not only the other parking bay cases that we have rejected but also potentially all the [Blue Badge] cases as well.”*
38. In accordance with the Council’s procedures, the Council’s Chief Executive responded to the Stage 2 complaint. The Stage 2 response reiterated the parking and mobility services officer’s comments that, on the face of it, C met the eligibility criteria but that the independent assessment had found that he did not meet the threshold in terms of mobility. It was felt that it would be unfair and inconsistent to change that decision.

Analysis

39. Before turning to the question of the Council’s consideration of the parking bay application, we note that the Council’s decision letters gave no clear reasons for refusal of the Blue Badge as set out in the guidance. It also gave no reasons why it had changed its decision and awarded a Blue Badge. We consider that to be fault.
40. We consider that the Council should have explained that it had awarded a Blue Badge on a discretionary basis, having regard to the assessor’s observations of the extreme difficulty experienced by the family. Had it done so, Mrs B would have been able to put this forward in support of her parking bay application.
41. As regards the Council’s parking bay policy, it is for the Council to determine whether to provide parking bays and to decide on the eligibility criteria. The Council has explained that it must balance the needs of a range of service users. In order to ensure that there is adequate general parking provision, it has chosen to set a higher threshold for the provision of parking bays than for the award of Blue Badges. We see no fault here.
42. However, when setting general policies, councils must also not unreasonably fetter their discretion, i.e. they must allow for occasions where the specific

circumstances of a case make it appropriate for them to depart from the general terms of their policy. Aside from that general discretion, the Council's parking bay policy also allows for exceptions to its policy where *"the applicant requires constant attendance or the driver is unable to handle required medical apparatus in addition to the applicant"*.

43. In this case, the Council has undertaken a mobility assessment in accordance with its procedures. The outcome of that assessment was that the score awarded to C's application did not meet the threshold for a parking bay. We see no fault in the way the assessment was carried out so we cannot question the score awarded.
44. However, the extensive correspondence on this case shows no evidence that the Council considered C's application properly under the *"exception"* clause in the policy. Moreover, the Council dismissed C's award of higher rate mobility DLA as being a lower threshold than its own criteria without either seeking further clarification of the basis for that award or properly considering its implications.
45. There are very specific circumstances under which higher rate mobility DLA can be awarded and the threshold is very high. It is clear that C does not meet the first five criteria for an award of higher rate mobility DLA. So, logically, it follows that C's award must have been made under either the *"severe mental impairment"* criteria, or on the basis that C is *"virtually unable to walk"* due to a physical disability.
46. To be awarded higher rate mobility DLA under criterion 6, on the basis of *"severe mental impairment"*, a child must meet all the following criteria:
- The child receives the higher rate DLA care component.
 - The child has *"a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning"*.
 - The child *"exhibits disruptive behaviour"* which:
 - a) *"is extreme"*
 - b) *"regularly requires another person to intervene and physically restrain them to prevent them causing injury to themselves or to another, or damage to property"* and
 - c) *"is so unpredictable that he requires another person to be present and watching over him whenever he is awake"*.
47. It follows therefore that, if C had been awarded higher rate mobility DLA under criterion 6, his application for a parking bay should have been considered as an exception on the basis that *"the applicant requires constant attendance"*.
48. Alternatively, to be awarded higher rate mobility DLA under criterion 7, on the basis of being *"virtually unable to walk"*, a child must have a physical disability which makes their ability to walk very limited. Behavioural issues with a physical origin can be taken into account. Interruptions in walking or a refusal to walk can be taken into account if this frequently limits how far they can walk.
49. We consider that the award of higher rate mobility DLA was directly relevant to Mrs B's appeal and should have been explored further in that the Tribunal had determined either that C was *"virtually unable to walk"* or that he *"requires constant attendance"*. We also consider that the Council's dismissal of that award

as being of a lower threshold than the Council's own mobility criteria suggests a lack of consideration of the implications of such an award.

Conclusion

50. We have found fault in the way that the Council considered Mrs B's application for a parking bay for C, and this has caused C and his family injustice. We have therefore considered what is an appropriate remedy for that injustice.
51. We considered whether to ask the Council to carry out a fresh mobility assessment. However, given the implications of the award of higher rate mobility DLA, the observations of the second assessor as to the severity of C's situation and the impact on the family, the Council's own discretionary award of a Blue Badge, and the information contained in the Child and Carer's Assessment, we consider that any reasonable consideration of whether the policy exception applied or whether to exercise discretion would have resulted in a decision to install a parking bay.

Recommended action

52. To remedy the injustice to C and his family, we recommend that the Council within three months:
 - install a parking bay for C;
 - pay the family £1,000 to reflect the significant distress and inconvenience caused as a result of the delay installing a parking bay;
 - review its parking bay policy within three months having regard to how it should take into account hidden disabilities;
 - once it has reviewed its policy, write to those applicants who have been refused a parking bay over the past year and inform them of the changes to its policy;
 - ensure that officers are aware of the implications of an award of higher rate mobility DLA and that decisions relating to parking bay applications take into account both the exceptions in its policy and the Council's general discretion; and
 - ensure that decision letters on both Blue Badge and parking bay applications contain sufficient information to enable the applicant to clearly understand the reasons for that decision.

Draft decision

53. On the evidence seen to date, we propose to complete our investigation into this complaint by issuing a report. We have found evidence of fault causing injustice. We have recommended action to remedy the injustice caused.