

# Report by the Local Government Ombudsman

**Investigation into a complaint against  
London Borough of Tower Hamlets  
(reference number: 15 018 561)**

**8 December 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.

# Investigation into complaint number 15 018 561 against London Borough of Tower Hamlets

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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

Ms X - the complainant

Y – a young child who has lived with Ms X since 2010

Ms M – Y’s birth mother (now deceased)

## Report summary

### Children's services: Family & friends carers

Ms X complains the Council has refused to accept that in November 2010 it placed Y and her two brothers with her following concern that Y's mother was unable to provide the children with suitable care. This would make the children looked after children and Ms X their family and friends foster carer.

From late December 2010 Y continued to live with Ms X but she complains the Council failed to provide Y and her with appropriate support, including financial support.

### Finding

Fault found causing injustice and recommendations made.

### Recommendations

To remedy the injustice caused, we recommend the Council:

- apologise to Ms X and Y for the failings we have identified;
- pay Ms X as if she had been a family and friends foster carer (less any state benefits provided to Ms X for the children) for three children from 29 November 2010 to 22 December 2010 and for one child from 23 December 2010 to the present day;
- pay Ms X £300 for the additional initial costs of caring for three children in November 2010 to reimburse her for such items as bedding, clothes and her petrol expenses when ensuring the children kept attending their school many miles away;
- pay Ms X £500 for the legal advice she obtained in 2013 and 2014 for the Special Guardianship Order;
- meet with Ms X to decide a way forward regarding parental responsibility and check if Ms X still wishes to pursue a Special Guardianship Order;
- pay Ms X £500 for the frustration and time and trouble caused by the Council not resolving her complaint sooner given she had complained for many years;
- ensure in future if it is involved in the arrangements for a child to be cared for by a private family arrangement that it ensures all parties are aware of the nature of the arrangement and where financial support may come from. It should also ensure proper records are made of this explanation so it is not in dispute. This will allow the carer to make an informed decision about whether to accept a child on a private arrangement;
- ensure it properly records requests for section 17 child in need support and how it assessed the situation before refusing to provide support; and

- hold a management review to look at the impact of our findings on the decisions and placements made for the two older children. The children and their carers may have been adversely affected by the Council's wrong assumption that it was a private family arrangement. The Council should assess if any injustice was caused and suggest an appropriate remedy for the carers and the children. It should report back to us with its findings.

The Council has accepted our recommendations.

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## Introduction

1. Ms X complains the Council has refused to accept that in November 2010 it placed Y and her two brothers with her following concern that Y's mother was unable to provide the children with suitable care. This would make the children looked after children and Ms X their family and friends foster carer.
2. From late December 2010 Y continued to live with Ms X but she complains the Council failed to provide Y and her with appropriate support, including financial support.

## Legal and administrative background

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 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. (*Local Government Act 1974, section 34(3)*)
5. The Ombudsman cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. We have decided there are good reasons to go back to November 2010. This is because there remains disagreement over how the children came to live with Ms X and the availability of records means we can come to a sound decision about these earlier events. Ms X has also complained to the Council regularly about this matter in the intervening years. (*Local Government Act 1974, sections 26B and 34D*)
6. We 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*)

## The law on children in need

7. The law states 'children in need' are children who:
  - need councils to provide them with services so they can achieve or maintain a reasonable standard of health or development; or
  - need councils to provide them with services to prevent them suffering significant or further harm to health or development; or
  - are disabled.

(*Children Act 1989, section 17*)

8. Councils can provide a range of services including financial support to children it has assessed as being 'in need'. At the time of the complaint councils used a short assessment tool called an Initial Assessment to decide whether a child was in need. An Initial Assessment would assess:
- the developmental and educational needs of the child;
  - the carers ability to respond to the child's needs; and
  - the family conditions which may affect the carer's ability to respond to the child's needs.

### **Councils' duty to provide accommodation to a child in need**

9. The law says councils have a duty to provide accommodation to any child in need in their area who requires it as a result of:
- there being no person who has parental responsibility for the child;
  - his being lost or having been abandoned; or
  - the person who has been caring for the child being prevented (whether or not permanently, and for whatever reason) from providing the child with suitable accommodation or care.

*(Children Act 1989, section 20)*

10. The law requires councils to firstly consider a placement with parents, then family and friends who are willing and able to act as foster carers before considering unrelated foster carers. *(Children Act 1989, section 22C)*
11. If the council makes arrangements for a child to be accommodated by someone other than its parents, the council must provide financial support to maintain the child in the form of a fostering allowance as well as practical support to the 'looked after child'.

### **Case law on family and friends care arrangements – the Southwark judgment**

12. A private family arrangement, sometimes called an informal family arrangement, occurs when a close relative has agreed with the parent to take on the care of their child. Other unrelated people can take on the care of a child under a private fostering arrangement made with the parent. Under these two arrangements there is no right to any financial support from any council but if the child is a 'child in need' a council could provide support under section 17 of the Children Act 1989. Councils do not supervise private family arrangements. Councils must assess private fostering arrangements with unrelated people if the care of the child is likely to be for more than 28 days.
13. The courts have looked at whether an arrangement for a child to live with a relative or friend was truly a private arrangement. The Court said where a council takes a major role in making arrangements for the child to be fostered it is likely to conclude it is acting under its duties to provide the child with accommodation. If the council is simply facilitating a

private arrangement the Court said councils must make it clear to all parties that those holding parental responsibility for the child were responsible for the financial arrangements to care for the child. (*London Borough of Southwark v D* [2007] EWCA 182)

14. Lady Justice Smith's comments, at paragraph 49, in the Southwark judgment clarify how a council might properly help in the making of a private (or informal) family arrangement:

*"We are prepared to accept that, in some circumstances, a private fostering arrangement might become available in such a way as to permit a local authority, which is on the verge of having to provide accommodation for a child, to 'side-step' that duty by helping to make a private fostering arrangement. However, it will be a question of fact as to whether that happens in any particular case. Usually, a private fostering arrangement will come about as the result of discussions between the proposed foster parent and either the child's parent(s) or a person with parental responsibility. But we accept that there might be occasions when a private arrangement is made without such direct contact. We accept that there might be cases in which the local authority plays a part in bringing about such an arrangement. However, where a local authority takes a major role in making arrangements for a child to be fostered, it is more likely to be concluded that, in doing so, it is exercising its powers and duties as a public authority pursuant to sections 20 and 23. If an authority wishes to play some role in making a private arrangement, it must make the nature of the arrangement plain to those involved. If the authority is facilitating a private arrangement, it must make it plain to the proposed foster parent that s/he must look to the parents or person with parental responsibility for financial support. The authority must explain that any financial assistance from public funds would be entirely a matter for the discretion of the local authority for the area in which the foster parent is living. Only on receipt of such information could the foster parent give informed consent to acceptance of the child under a private fostering agreement. If such matters are left unclear, there is a danger that the foster parent (and subsequently the court) will conclude that the local authority was acting under its statutory powers and duties and that the arrangement was not a private one at all."*

15. At paragraph 50 Lady Justice Smith noted Southwark took a central role in making the arrangements for the child to live with the relative. It dictated how contact should take place with the parent and arranged a meeting of all relevant parties. Lady Justice Smith said:

*"Those factors are far more consistent with the exercise of statutory powers by Southwark than the facilitating of a private arrangement..."*

16. For an arrangement to be a private arrangement Lady Justice Smith commented, at paragraph 59, in the Southwark judgment that:

*"It seems to us that a full explanation and a proper understanding is even more imperative where the local authority is seeking to discharge its obligations by arranging that someone else will shoulder them."*

## Special Guardians

17. A Special Guardianship Order is a private Court order for children who cannot live with their birth family. It gives the Special Guardian parental responsibility for the child without removing entirely the parental responsibility of the birth parent. Children cared for by a Special Guardianship Order are not 'looked after children' under the Children Act.
18. Special Guardianship Allowance is a means tested allowance available to Special Guardians. The Statutory Guidance says councils must have regard to how much fostering allowance would have been paid had the child been fostered rather than cared for under a Special Guardianship Order. Case law has confirmed the starting rate for Special Guardianship Allowances should be in line with local fostering allowance, minus an amount for child benefit and child tax credit as foster carers cannot claim these benefits.

## How we considered this complaint

19. This report has been produced following the examination of relevant files and documents and interviews with the complainant.
20. The complainant and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.
21. Under the information sharing agreement between the Local Government Ombudsman and the Office for Standards in Education, Children's Services and Skills (Ofsted), we intend to share this report with Ofsted.

## Investigation

### Background

22. Ms M had three children, the youngest of which was Y. Ms M had problems with drugs and alcohol. The Council classed her children as 'children in need'. They had Child in Need Plans which the Council last reviewed in 2008, the year Y was born. The Council had carried out a pre-birth assessment of Y as it had concerns about Ms M's ability to provide suitable care. The two older children lived with their grandmother under a Residence Order until the grandmother died in 2009 and they moved back to live with their mother.
23. In March 2010 the Council's files noted it had not carried out a Core Assessment of the children's welfare and it had missed a number of opportunities to assess and plan. The Council officer who made the notes felt the children should have been on Child Protection Plans much sooner and Y should have had one from birth.

24. At times Ms M was hospitalised as a result of the effects of her drug and alcohol problems. She would tell the Council the details of close relatives who could care for her children temporarily, including their aunts and grandfather. The Council would then assess these adults in their home, carry out police checks and decide if the Council felt they would be suitable carers.
25. In July 2010 the Council carried out a Core Assessment of the children. It arranged for a Child Protection Conference as it was concerned about the children's welfare. The children were placed on Child Protection Plans for neglect.
26. The Child Protection Review Conference in October 2010 decided the children should remain on those Plans for neglect. It said there had been a further deterioration since the last Conference and it was concerned about Ms M's ability to meet the children's basic care needs. It also had concerns about the children's school attendance and requested the Council support Ms M to ensure their attendance.
27. In November 2010, during a visit to the family home, the Social Worker found the eldest child was out of school and Ms M had been hospitalised again as a result of her alcohol problems. She was by now terminally ill. Her older children were considered to be young carers. The home was in a poor state. The Social Worker noted that "*Care has been considered*". The Social Worker arranged for the children to stay with family members until the Council could assess Ms M's ability to care for the children. The aunt said she had only agreed to provide care until Ms M came out of hospital. The Council arranged transport for the older children to get them to school over the next few weeks.
28. Ms M told the Social Worker she could not ask her extended family for support as they had told her they could not really support and monitor the situation.
29. The Council considered if it should begin care proceedings at its Entry to Care Panel on 16 November 2010. The Panel decided the Council should not seek care proceedings to remove the children from Ms M. It decided the extended family members should be contacted and informed about Ms M's terminal illness. It said the Council should discuss with Ms M her plans for the children in view of her prognosis.
30. Ms X is a friend of Ms M's sister. Ms X is a single parent with three children. She lived in a three bedroom council property and in 2010 was reliant on state benefits alone. She says she did not really know Ms M. However around June 2010 she cared for Ms M's eldest child for a few hours after a friend asked her to pick him up from school when Ms M failed to collect him. She says she only spent a few hours with the boy before Ms M collected him from her house. She says as a result of this Ms M had her telephone number. Ms X says she had not met the boy before and this was the only contact she had had with Ms M's children. The Council was unaware of Ms X or that she had provided a few hours of care to one of the children in June until the following events. There is no reference to Ms X in the children's file prior to the end of November 2010.

## **Ms M's three children go to live with Ms X**

31. What happened on 29 November 2010 is disputed by the Council and Ms X.

### ***The Council's version of events***

32. The Council says Ms M's sister called the Council with her concerns that Ms M had been drinking all day. She felt the children should be removed from Ms M. The Council says the aunt agreed to go away and find out who could care for the children. It says the aunt called back to say Ms X, "a cousin", could care for the children and she had done this before in June. (Ms X is not related to Ms M.) The Council held a Strategy Discussion and decided a section 47 safeguarding investigation should be started and the children spoken to alone. It also decided the Social Worker would ask if family members could care for the children either as a respite or on a longer term basis.

33. The Social Worker then visited Ms M and she said she was drinking again. Ms M said the children could live with Ms X as a family arrangement. However Ms M was not happy about the situation and was shouting at the Social Worker and her family saying she would not speak to her sister again for reporting her to Children's Services. The Social Worker arranged to visit Ms X at home to check it was suitable for Ms M's children.

### ***Ms X's version of events***

34. Ms X says she received a telephone call from the Social Worker after Ms M gave her Ms X's telephone number. Ms X says the Social Worker asked her to care for the three children temporarily. She agreed to step in and went to the property. She says there were two Social Workers present. She says although the Social Workers had never met her before, and Ms X did not know the children apart from the older child who she had looked after for a couple of hours in June, they allowed her to take the children. She says the Social Workers asked her to write her telephone number and address on a piece of paper. She says Ms M was crying and saying they were stealing her children from her. She says the children had no clothes or school uniform with them. Y, the youngest was two years old at the time.

### ***Later events***

35. The Council visited Ms X's property the next day. It noted Ms X said she was happy to care for the children for the time that was needed. The Council's records note it as a "Respite placement with [Ms X]". It noted Ms X's three bedroom house was quite small for her and now six children. Ms X says she had to 'top and tail' four of the children. Ms X took the older children to school, an 18 mile round trip. The Council did not offer to help her with their school transport costs.

36. The Council's notes record Ms M refused to let family members into her house to collect her children's clothes. She refused to give Ms X the child benefit payments she received for the children. The Social Worker noted the Council would not help Ms X financially as the children were not 'in care'.

37. The Council's record says Ms X said she could care for the children long term. The Social Worker noted the children looked well in Ms X's care. The Social Worker asked the children's aunts if they were willing to care for the children in the long term. The Social Worker decided to refer the case to "Private Fostering" if Ms X was going to care for the children for more than 28 days without a care order.
38. On 16 December 2010 the Council held a Family Group Conference. Family members attended along with Ms X. Ms M did not attend. The Council's report before the meeting said:
- "The family need to devise a plan to keep the children safe at all times."*
- "If the family fail to devise a suitable plan, the Local Authority will seek legal advice which may result in initiating Court proceedings."*
- "If the situation continues to deteriorate, Children's Services could apply for Parental Responsibility for the children."*
39. The minutes of the meeting say the family agreed Ms M should not have the children. The minutes note Ms X was willing to be a long term guardian for Y on a permanent basis.
40. Around a week later the two older children went to live with different aunts and Y remained with Ms X. A few months later the eldest child left the aunt's home and went into foster care, becoming a 'looked after child'.

### **Y stays with Ms X on a long term basis**

41. Ms X says she often asked the Council to give her financial support for caring for Y, as well as earlier requests for support when she cared for all three children. She asked for help with the cost of the children's clothes, school uniform, school transport, a car seat for Y, a bed, food and alike. She says the Council refused all her requests.
42. In a Child Protection Review Conference in March 2011 the minutes of the meeting record:
- "[Y] was placed with a family friend [Ms X] ..."*
43. The Review Conference decided to keep Y on a Child Protection Plan as her placement with Ms X, although going well, was not secure. It suggested Ms X needed to apply for a court order to gain parental responsibility for Y. It said Ms M was not in a position to care for the children and if she attempted to remove them from their placements the Council should seek legal advice. The Child Protection Plan noted that Ms X had taken on Y's care without financial support from the Council but it was clearly having an impact on her as a carer. It said Children's Social Care should consider providing support to Ms X as a carer for Y.
44. On 8 April 2011 a manager from the Council's Children's Schools and Families Directorate wrote a letter to a local primary school to ask it to provide Y with a school place. The letter explained the background to the case. It said:

*“[Y] has a Child Protection Plan in place and was been [sic] placed in the care of [Ms X] by the Social Services on 29 November 2010.”*

45. On 27 April 2011 a Council Social Worker also wrote to the school. She said:

*“[Y] was placed in [Ms X’s] care in order to safeguard her welfare and ensure her safety.”*

46. In September 2011 the Child Protection Review Conference decided to discontinue Y’s Child Protection Plan and instead decided she would be treated as a ‘child in need’. It noted a Residence Order or Special Guardianship Order for Ms X would give greater security for Y. It said contact between Ms M and Y should be supervised. The Child in Need Plan asked the Council to consider reassessing its position about providing Ms X with financial support to ensure the placement remained stable and sustainable.

47. On 2 October 2011 the Council gave Ms X two payments totalling £200.

48. In October 2011 the Council conducted a viability assessment of Ms X. The document is headed ‘Prospective Kinship Care Placement’. It was a positive assessment.

49. In 2012 the Council agreed to pay Ms X £500 to get legal advice about obtaining a Residence Order. However, Ms X says she paid the £500 bill for legal advice in 2015. Given the Council’s offer in 2012, she would like the Council to reimburse her this money. In May 2012 the Council paid Ms X £100 to purchase a bed for Y.

50. In 2012 Ms M died. From that date on there has been no one who has parental responsibility for Y.

### **Consideration of Special Guardianship**

51. In July 2012 Ms X went to Court to get parental responsibility for Y. The Court ordered the Council to carry out assessment of Ms X for a Special Guardianship Order. In the meantime, it gave Ms X an Interim Residence Order so she could have temporary parental responsibility for Y.

52. As part of the assessments for Court the Council carried out a financial assessment of Ms X. This concluded she would be entitled to the maximum Special Guardianship Allowance of £48.58 a week. This later increased to £85.61 a week after Y went into the next age band.

53. Ms X says after receiving advice from a family rights charity, she was not happy with the Special Guardianship support package offered by the Council. She felt the Council should have paid her for caring for Y since November 2010 as a family and friends foster carer as it had placed Y with her. The Council rejected her claim saying it was a private arrangement made at the Family Group Conference on 16 December 2010 and Y was not a ‘looked after child’.

54. Ms X explored the option of taking a Judicial Review and her solicitors wrote to the Council. The Council maintained it was a private arrangement.

55. The Court considered the Special Guardianship application again in July 2013. By then Ms X had decided to withdraw her request until the Council agreed to accept it placed Y with her and should have treated her as a family and friends foster carer from November 2010. The Judge allowed Ms X to withdraw her request and noted she had managed to cope without having parental responsibility for Y since November 2010. This ended the Interim Residence Order. After considering the case the Judge's recorded comments say:
- *"...what is clear is [Y] was 'placed' into the care of Ms X when it became clear she could not reside with her mother. What is unclear is how the arrangement was made."*
  - the Council had implied to Ms X that if Y was *"not cared for by family member [...] she would be placed into foster care"*.
  - *"The local authority suggest that the arrangement was a private foster carer arrangement but I have seen no evidence of any agreement between the mother and [Ms X] to that effect."*
  - Ms X's requests for financial support from the Council were *"woefully overlooked"*.
56. In January 2014 the Council carried out a Core Assessment of Y, the first since July 2010. This was as a result of Ms X withdrawing her application for a Special Guardianship Order. The Council concluded Y was well cared for by Ms X.
57. In 2014 Ms X's solicitors told her it would no longer be considering action against the Council for Judicial Review as her potential claim was now 'out of time'.
58. In March 2015 the Council made Ms X an offer of an ex gratia payment of £6,000 which Ms X rejected. It says it made this offer after the Court ordered the Council give proper consideration to making an ex gratia payment in 2014 to resolve the disputed issues and avoid any unnecessary expense of a Judicial Review.
59. Ms X says she continually asked the Council for financial and emotional support to care for Y but it did not provide it. She says she had to use up all her savings. She wants the Council to pay her from November 2010 to the present and put in place a package of support for Y for the future. She says once this is resolved she is willing to seek parental responsibility for Y.
60. In 2016 the Council closed Y's case.
61. The Council told us it still feels it is imperative for Ms X to get an Order for Y to give her parental responsibility for her. The Council has also advised her to consider adopting Y. It says although Ms X does not have parental responsibility for Y, section 3(5) of the Children Act 1989 says a person who does not have parental responsibility but has the care of the child can do what is reasonable to safeguard the child and promote their welfare.

62. In response to our enquiries the Council increased its offer of an ex gratia payment to Ms X to £8,000.

## Conclusions

### Private arrangement or family and friends foster care

63. The Council says the three children came to live with Ms X on 29 November 2010 as a private fostering arrangement between Ms M and Ms X. Ms X believes the Council placed Y and her two brothers with her in late November 2010 and it should have paid her and supported her to care for Y and her brothers, and later Y alone, as their foster carer.
64. Our role is to consider the evidence and, if there is sufficient evidence, decide who is right.
65. The mounting evidence in 2010 shows Ms M was unable to provide suitable care for her three children. They were on Child Protection Plans for neglect. A Social Worker had recorded that the children should have had greater child protection support much sooner and the case had been allowed to drift. Ms M was becoming increasingly ill and abused both alcohol and drugs. By November 2010 she was frequently hospitalised and the children were often passed out to live with various relatives. Their school attendance was poor. This is a concern when children are on Child Protection Plans as school provides a level of safeguarding.
66. The Council considered taking care proceedings to remove the children just a few days before they went to live with Ms X. The case was considered by its Entry to Care Panel. The Panel decided the Council should instead ask Ms M about her plans for caring for the children given she was by then terminally ill. However, there is no record of the Council asking Ms M her long term plans for the children's care before the events on 29 November 2010 when the children went to live with Ms X.
67. The Council became involved on 29 November 2010 because Ms M could not provide the children with suitable care. She had been drinking all day and was becoming increasingly seriously unwell as a result of her substance abuse.
68. Following a difficult visit to Ms M, the children went to stay with Ms X on 29 November 2010. The Council says this was a private family arrangement made without its involvement. We do not agree for the following reasons.
- **The Council was involved** because the children were subject to Child Protection Plans so the Council had oversight of their care; the Council was on the verge of taking the children into care; two social workers were present when the arrangements were made for the children to stay with Ms X.
  - **Ms M could not consent to Ms X taking her children** because she was under the influence of a significant amount of alcohol.

- **Ms X could not give informed consent to a private arrangement** because the social workers did not explain that she was agreeing to a private fostering arrangement and she would not get financial support from the Council.

69. The Council says arrangements for the children's long term care were agreed at the Family Group Meeting held on 16 December 2010. The Council says the family agreed Ms X would take on the long term care of Y. It insists this again shows it was a private arrangement. We do not agree for the following reasons.

- **The Council arranged the meeting to decide where the children would live.** Such a meeting suggests the Council acting under its statutory powers, as Lady Justice Smith noted in the Southwark case, indicating an arrangement is not private.
- **Ms M was not present at that meeting and therefore not able to agree** to Ms X taking on Y for the long term. For it to be a private family arrangement the parent would need to make the arrangement directly with the carer.
- **The Council implied the children would go to unknown foster carers** if the family did not agree to care for them. The Council failed to explain the options to the family, including family and friends care should be explored first, so they could not make an informed decision.
- **Ms M had refused to let the family enter her home** to get the children's possessions. In addition Ms M refused to give Ms X any financial support, including the benefits she received for the children. Her actions show she did not consent to the arrangement.
- **The Council failed to clearly explain to Ms X that by agreeing to a private arrangement she would not get any financial support from the Council.** Only on receipt of this information could Ms X make an informed consent to take on the children under a private arrangement where the Council was involved in the arrangements. This is especially relevant as due to the Council's involvement in the case, as discussed in the Southwark case, it must make the nature of the arrangement plain to the proposed carer.

70. The Council says its records of 29 November 2010 say that it was a private arrangement. However, other Council records refer to the children being placed with Ms X, including:

- a record dated 1 December 2010 in which the Council describes the arrangement as a "*Respite placement with [Ms X]*";
- two different Council Officers wrote to Y's school in April 2011 to say the Council 'placed' Y with Ms X.

71. In the case *SA v Kent County Council [2010] EWHC 848 (Admin)*, Kent County Council had made arrangements for a child to live with its grandmother after it had concerns about the care the mother was providing to the child. Kent County Council felt it was a private

fostering arrangement. The Court said the council had taken the lead in the arrangements and had remained involved in the arrangement but had failed to explain the grandmother would be herself financially liable for the grandchild. The Court said:

*“the way in which a local authority choose to label their actions cannot dictate the legal consequences of them”.*

72. Having considered the evidence, we conclude it was not a private arrangement. The duty to accommodate the three children arose on 29 November 2010 when Ms M could no longer provide them with suitable accommodation or care. The Council did not make the arrangements clear to Ms X and therefore it could not sidestep its duty to accommodate the children. The Council should have paid and supported Ms X and the children as if they were looked after children from 29 November 2010 to 22 December 2010. From 22 December 2010 to the present day it should have paid Ms X and supported her and Y as a looked after child to the present day. We note the Judge in Ms X's aborted Special Guardianship Order application reached the same conclusion.
73. This is a significant fault and caused a significant injustice to Ms X and Y. The Council has accepted our finding.

#### **Failure to provide section 17 support**

74. During the period the Council believed it was a private arrangement, it failed to consider what support (including financial support) Y, and initially all three children, needed as children in need.
75. When all three children went to live with Ms X in late 2010 they were all children in need because they were all on Child Protection Plans for neglect. They arrived with no possessions, school uniform, spare clothes, beds, cot, bedding, car seat and alike. Ms X incurred costs transporting the children to school some distance from her home to ensure they had excellent school attendance where they previously had poor attendance.
76. Just before the children came to live with Ms X, the Council had agreed to provide school transport, by way of a taxi, for the older two children. However when Ms X took on their care the Council did not provide this support. The Council also did not offer to pay Ms X a mileage rate for the 18 mile round trip to take them to school each day.
77. There is no evidence on file as to why the Council did not agree to Ms X's request for financial support, apart from to say they were not in care. Children in need do not have to be 'in care' to receive support. When Ms X took on the children in November 2010 it was on an emergency basis. The Council was aware Ms X was not a wealthy woman. She was entirely supported by benefits. The Council was aware she was receiving no money from the children's mother and no state benefits for the children. Ms X did not have enough beds for the children to sleep in, resulting in four of them 'top and tailing'. She also did not have enough clothes or school uniform. The Council failed to provide her with any money or practical support even though they knew Ms M was not providing Ms X with any financial support.

78. The Council was asked twice during the Child Protection Review Conferences in March 2011 and September 2012 to review its position about providing financial support to Ms X to ensure the placement remained stable and sustainable. In response the Council paid Ms X £200 in October 2011, 11 months after the events when the children first came to live with her. It then paid £100 in May 2012 for a bed for Y. This appears insufficient for Ms X to care for Y and to ensure the placement was sustainable given she was reliant on state benefits and had three children of her own. The basis for the Council not providing Ms X with section 17 financial support before that date is not evident from its files. A failure to come to a properly informed decision was fault and it left Ms X and Y without adequate financial support.
79. Without a proper assessment of the children's needs and Ms X's ability to financially support them the Council could not have concluded it did not need to support the children. It could easily have made payments for food, clothes, car seat, bedding, and a mileage rate to school at very little cost to the Council but at great benefit to Ms X and the children.
80. The Council later assessed Ms X's financial income and her projected outgoings as part of its financial assessment for Special Guardianship. At the time she was only caring for Y as well as her own three children. The Council's assessment found Ms X was significantly out of pocket. It estimated the shortfall in her disposable income was over £950 a month. As a result, without suitable financial support Ms X suffered a significant financial injustice.

### **Special Guardianship**

81. Although the Council appears to have made an offer to Ms X in line with its policy on paying Special Guardianship Allowance, Ms X declined. This was because she received advice from a family rights charity that she had not had the proper support in place from 2010. Ms X wanted her and Y to receive the support they would get if Y were a looked after child. If a child was a looked after child at the time a Special Guardianship Order is granted, the level of support they are entitled to receive from the Council is strengthened.
82. The Judge in the case heard her reasons for wanting to withdraw from the Order application and accepted her choice. The Judge was critical of the financial support the Council had already failed to offer Ms X for caring for Y and the way Y came to live with Ms X. The Judge said there was no evidence of a private arrangement.
83. Ms X would like the Council to reimburse her the £500 bill she incurred for the legal advice for the Special Guardianship Order. Ms X withdrew from the Special Guardianship Order application, and the Court allowed this, as a result of the Council failing to accept she was Y's family and friends foster carer. As we have found the Council's decision was flawed we have asked the Council to reimburse this fee and it has agreed.
84. The Council is still keen for Ms X to obtain a Special Guardianship Order for Y to give her parental responsibility. Currently no one has parental responsibility for Y. It says its latest report of her care of Y is positive and it would offer her a package of support including financial support if she wishes to apply to court for a Special Guardianship Order. Ms X

has told us she would be keen to go ahead with an Order and gain parental responsibility for Y if her complaint can be resolved.

### **The Council's offer to Ms X**

85. The Council offered Ms X an ex gratia payment of £6,000 in 2014 and increased it to £8,000 in 2016 during our investigation. Ex gratia means a payment made from a moral obligation rather than because of any legal requirement. As the Council failed to properly consider its duty to accommodate the children and there is no evidence the placement was a private arrangement, the Council should have paid Ms X as a family and friends foster carer. The payments she is owed are considerably more than the offer it has made. Therefore, the Council has not made a suitable offer.

### **Others who may be affected**

86. As Ms M could not have given her consent to a private family arrangement for Ms X to care for Y in November and December 2010 this may have implications to the other family members involved. Both the older two children and the carers who took them on.
87. After the Family Group Conference in December 2010 the two older children went to live with different aunts. A private arrangement could not have been made on that day as Ms M was not present. Therefore, it is possible the Council should have considered these two aunts as family and friends foster carers and provided them with suitable practical and financial support to help them care for each child.
88. One child's placement with an aunt broke down a few months later due to his behaviour. Ms X says the Council placed him in a foster care and later a residential home. The impact of a lack of support to him as a looked after child from December 2010 to his entering care may have caused him a disadvantage. He is now an adult.
89. Ms X says the other child, initially placed with a different aunt, has moved placements nine times since 2010. This included a brief spell back with Ms X. He is now back living with the original aunt. Ms X says the aunt's home was a one bedroom property and the aunt had children of her own. Therefore it is possible both the aunt and other carers caring for this child, along with the child, may have suffered a disadvantage by not having the support from the Council as a looked after child.
90. We have insufficient evidence about these children and their carers to come to a firm conclusion. Therefore, we recommend the Council takes action to carry out its own investigation. The Council has agreed. The carer of one of these children has recently complained to us.

### **Decision**

91. We have completed our investigation. There was significant fault causing significant injustice to Y's two older siblings and the family and friends carers looking after them. The Council should take the action identified in paragraph 92 to remedy that injustice.

## Recommendations

92. We recommended within three months of the date of this report the Council should:

- apologise to Ms X and Y for the failings we have identified;
- pay Ms X as if she had been a family and friends foster carer (less any state benefits provided to Ms X for the children) for three children from 29 November 2010 to 22 December 2010 and for one child from 23 December 2010 to the present day;
- pay Ms X £300 for the additional initial costs of caring for three children in November 2010 to reimburse her for such items as bedding, clothes and her petrol expenses when ensuring the children regularly attended their school many miles away;
- pay Ms X £500 for the legal advice she obtained in 2013 and 2014 for the Special Guardianship Order;
- meet with Ms X to decide a way forward regarding parental responsibility and check if Ms X still wishes to pursue a Special Guardianship Order;
- pay Ms X £500 for the frustration and time and trouble caused by the Council not resolving her complaint sooner given she had complained for many years;
- ensure in future if it is involved in the arrangements for a child to be cared for by a private family arrangement that it ensures all parties are aware of the nature of the arrangement and where financial support may come from. It should also ensure proper records are made of this explanation so it is not in dispute. This will allow the carer to make an informed decision about whether to accept a child on a private arrangement;
- ensure it properly records requests for section 17 child in need support and how it assessed the situation before refusing to provide support; and
- hold a management review to look at the impact of our findings on the decisions and placements made for the two older children. The two older children and their carers may have been adversely affected by the Council's wrong assumption that it was a private family arrangement. The Council should assess if any injustice was caused and suggest an appropriate remedy for the carers and the children. It should report back to us with its findings.

The Council has accepted our recommendations.