

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

**Investigation into a complaint about
Royal Borough of Windsor and Maidenhead
Council
(reference number: 21 012 481)**

28 March 2023

The Ombudsman's role

For more than 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

Mr X	The complainant
Y	The complainant's daughter

Report summary

Education and children's services

Councils are required by law to secure between 570 and 1,140 hours of free childcare over no fewer than 38 weeks for qualifying children in their area. This is known as the Free Early Education Entitlement.

Mr X complained the Council has not ensured his childcare provider, a nursery, has provided fair access to a free place and has charged him a "top-up" fee. He also complained the Council has not ensured his childcare provider issues clear and transparent invoices. Mr X said he has spent money on childcare he expected to be free.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

To remedy the injustice caused we recommend the Council:

- apologise to Mr X in writing;
- pay Mr X £100 for his time and trouble in bringing his complaint as the Council did not initially investigate his concerns and referred him back to the nursery;
- pay Mr X 50% of the consumables charge from January 2021 (when he first contacted the Council about his concerns) until the date Y left the nursery; and
- work with the nursery to ensure it amends its invoices and receipts, so they are clear and transparent. Invoices and receipts should itemise all charges so parents can see they have received their child's free entitlement and understand any extra charges. If any of the charges are voluntary, this should also be made clear.

The complaint

1. Mr X complained the Council has not ensured his childcare provider, a nursery, has provided fair access to a free place and has charged him a “top-up” fee. He also complained the Council has not ensured his childcare provider issues clear and transparent invoices. Mr X said he has spent money on childcare he expected to be free.

Legal and administrative background

The Ombudsman’s role and powers

2. We investigate complaints about ‘maladministration’ and ‘service failure’. In this report, we have used the word ‘fault’ to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as ‘injustice’. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
3. We 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. (*Local Government Act 1974, sections 26B and 34D, as amended*)

Free Early Education Entitlement

4. The Childcare Act 2006 (as amended) places a duty on councils to secure early education provision free of charge at either 15 or 30 hours a week for a qualifying child, over at least 38 weeks of the year. This is known as the Free Early Education Entitlement (FEEE). The government has also issued statutory guidance councils must follow.
5. The guidance says the free places must be delivered completely free of charge. Councils should ensure that providers do not charge parents “top-up” fees (any difference between a provider’s normal charge to parents and the funding they receive from the local authority to deliver free places). (*Early education and childcare. Statutory guidance for local authorities published by the Department for Education in June 2018, paragraph A1.30*)
6. Providers can charge for meals and snacks, and consumables such as nappies or sun cream, as part of a free entitlement place, although these charges must be voluntary. (*Early education and childcare. Statutory guidance for local authorities published by the Department for Education in June 2018, paragraph A1.25*)
7. Councils should ensure that providers are completely transparent about any additional charges, for example for those parents opting to purchase additional hours or additional services. (*Early education and childcare. Statutory guidance for local authorities published by the Department for Education in June 2018, paragraph A1.29*)
8. Councils should “Work with providers to ensure their invoices and receipts are clear, transparent and itemised allowing parents to see that they have received their child’s free entitlement completely free of charge and understand fees paid for additional hours or services.” (*Early education and childcare. Statutory guidance for local authorities published by the Department for Education in June 2018, paragraph A1.33*)
9. Councils must exercise their functions with a view to securing childcare providers’ compliance with these requirements. (*Childcare Act 2006, s9(2)*)

-
10. In 2021, we urged councils to have better oversight of nurseries offering free early years places after a nursery chain was found to be charging parents a top-up fee. In a statement accompanying the report on that case the Ombudsman said:

“Guidance states that councils should work with providers to ensure invoices are clear, transparent and itemised. Free must mean free... We are concerned that local authorities may not be delivering on the government’s pledge to parents, so I would urge other councils across the country to check their processes to ensure providers in their area are not making the same errors.”

How we considered this complaint

11. We produced this report after examining relevant documents and speaking to the complainant.
12. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

Background

13. The Council has an agreement with the nursery to deliver the FEEE.
14. Mr X’s daughter Y attended the nursery four days a week totaling 40 hours a week. From January 2020, she started to receive 15 hours of free childcare as the nursery only offered the 30 hours to those attending five days a week. This meant Y was supposed to receive 570 hours of free childcare a year under the FEEE (15 hours a week for 38 weeks of the year).
15. In April 2020, the nursery changed its policy to allow those attending four days a week to receive the full 30 hours of free childcare. This was during the national COVID-19 lockdown and at this time Y did not attend the nursery. Y returned to the nursery in June 2020 and was eligible at this point for 30 hours of free childcare. She was entitled to 1,140 hours of free childcare a year under the FEEE (30 hours a week for 38 weeks a year).
16. The entitlement to free childcare was only during termtime, (that is 38 weeks of the year) and the nursery was open for 47.5 weeks of the year. The nursery had the option to either pass on the FEEE on a term-time basis and fully charge for the holiday periods, or spread (‘stretch’) the FEEE over the number of weeks it was open and then charge for any additional non-funded hours each week at its own private rate.
17. In Mr X’s case the nursery stretched the FEEE over the full year. This meant Y was entitled to 24 hours of free childcare a week.
18. In December 2020, the nursery wrote to Mr X about funding for 2021 for Y. The letter said government funding was available for the nursery to claim for 38 weeks of the year, but the funded hours did not cover food and consumables. The letter said the nursery would charge for those using the government funded hours and did not say anything about the charges being voluntary.

Mr X’s complaint

19. Before contacting the Council Mr X raised concerns with the nursery about the fees he was paying. Email correspondence between Mr X and the nursery showed the nursery told Mr X how his FEEE had been stretched out across the

-
- whole year. The nursery also confirmed it charged daily for consumables, however there was nothing in this correspondence to say the charge was voluntary.
20. Mr X initially contacted the Council in January 2021 and queried the fees charged by the nursery. The Council responded to Mr X and explained how the FEEE worked.
 21. Mr X sent the Council invoices he received from the nursery. Mr X also queried the funding rate provided to the nursery by the Council as this was less than what the nursery charged privately.
 22. Mr X engaged in further correspondence with the Council in February 2021 and disputed that he was receiving free childcare. The Council told Mr X he needed to engage with the nursery again as the invoice it provided was not satisfactory. Mr X's invoices only showed a total amount payable each month and did not show how the non-funded hours were calculated or any additional charges.
 23. In September 2021 Mr X complained to the Council. He said he had overpaid over £5,000 in fees since 2017 and wanted this refunded. Mr X said he did not believe he was receiving the 30 hours of free childcare each week. Mr X said the Council should fund the full hourly rate of the nursery, and as it was not, he believed he was not getting the full 30 hours free childcare a week.
 24. The Council provided its initial response to Mr X's complaint on 30 September 2021. The Council said the information it had previously given Mr X was correct. The Council said it sets a rate for all providers across the borough and providers must not charge a top-up fee on these funded hours. The Council said providers can charge for extra services they provide and must set these charges out. The Council said it would contact the provider to arrange a meeting to obtain a full explanation and breakdown of charges.
 25. The Council met with the provider to discuss the charges. The notes from the meeting showed the nursery gave the Council a spreadsheet which detailed how the funding is worked out for each setting including the breakdown of daily funded hours offered, the non-funded hourly and consumable charges.
 26. In October 2021, Mr X asked the Council to consider his complaint at the next stage of its complaints process. Mr X said the Council had not explained how its practices were different from a news article which highlighted incorrect practices by another council. Mr X also said he should not pay anything for the free hours of childcare he was entitled to and if the private rate for these hours was £7 an hour this was what he expected the Council to cover.
 27. The Council provided its final response to Mr X's complaint in November 2021. The Council said:
 - the responsibility for charging parents rests with the nursery. Nurseries cannot charge top-up fees on top of the hourly funding they receive from councils, but they can charge a daily supplement for extra services such as meals; and
 - providers are allowed to set their own charging policies, therefore different providers can charge different rates for services.
 28. Mr X remained dissatisfied and complained to us. He believed he did not receive the free hours of childcare he was entitled to.
 29. In response to our enquiries the Council provided a spreadsheet from the nursery showing what fees Mr X paid each month. It also provided a table showing how

the nursery worked out funding. This included a breakdown of the daily funded hours offered, non-funded hours and costs for consumables.

30. The Council said it believed Mr X thought Y should have received 30 hours of free early education every week for 47.5 weeks of the year. The Council also said Mr X thought it should have been paying an hourly FEEE rate equivalent to the nursery's own private fees rate. The Council said the nursery had not charged any top-up fees to Mr X but had charged Mr X for additional non-funded hours and consumables and additional services outside of the funded hours allowance. Mr X had received his correct funded hours allowance, and the nursery received the correct rate for these funded hours.
31. In response to the draft of this report the Council said its duty to ensure childcare providers comply with the requirements set out the statutory guidance (in paragraphs four to nine above) fits alongside its other duties including value for money, operating within its budget, and taking proportionate action. The Council said its approach is to operate a series of briefings, guidance documentation and funding agreements for providers, which makes clear what they must do. The Council felt this was an appropriate method for it to exercise its function in an appropriate and cost-effective manner.

Conclusions

Clear and transparent invoices

32. The invoices Mr X provided showed only the total amount payable each month. The invoices do not itemise the charges, show how they were calculated, or list a breakdown of the charges for consumables Mr X pays for. It is therefore not possible, from the invoices, to see how the total monthly figure was calculated or whether Y received her free hours entitlement completely free of charge.
33. Government guidance says councils should work with providers to ensure their invoices are clear and transparent. The law says councils must exercise their functions with a view to securing the provider's compliance with these requirements. While the Council did meet with the nursery in September 2021, it has failed to work with the nursery to ensure its invoices were clear and transparent. This is fault.
34. Mr X has suffered injustice as he did not receive clear invoices and does not know whether Y received her free hours entitlement completely free of charge. The Council should work with the nursery to ensure their invoices and receipts are clear, transparent and itemised.

Top-up fees

35. The information the nursery provided the Council at its meeting in September 2021, showed how it calculates its fees for children receiving FEEE.
36. This showed the nursery charges £7 an hour to parents paying privately and each day is 10 hours. Therefore, the nursery receives £70 a day from parents paying privately.
37. For each government funded hour the nursery receives £4.82. Y attends the nursery for 40 hours a week. She receives 24 hours free each week (as the nursery stretches the FEEE over the full year) and the remaining 16 hours a week are charged at the private rate of £7 an hour. This works out at 6 hours of government funded hours a day and 4 hours a day charged at the private nursery rate. The nursery applies a daily consumable charge of £13.08 for Y.

-
38. If we add these figures up, the nursery will receive £70 a day for Y.
- £28 – 4 hours at the private nursery rate.
 - £28.92 – 6 hours at the council funded rate.
 - £13.08 – daily consumable charge.
39. The information from the nursery shows that, regardless of the number of free hours a child receives, the consumable charge it charges is adjusted to ensure the total figure the nursery receives is £70 a day, which is the same as its daily private rate.
40. While the nursery can charge for consumables this charge must be voluntary. Mr X says he did not know the charges for consumables were voluntary. In response to our enquiries on this point the Council asked the nursery to respond to us. The nursery said it put up information on its notice board to show the charges for consumables were voluntary.
41. The nursery also provided a letter it sent to Mr X in December 2020, this stated, *“the funded hours do not cover food and consumables for which a charge will be made whilst using the government funded hours.”* Mr X has provided email correspondence he had with the nursery which told him he was being charged a fee for consumables but there was no mention that the fee was voluntary.
42. Although the nursery says it put information on its notice board which says the charges are voluntary, the letter the nursery sent to Mr X contradicts this and tells him a charge will be made for consumables if he uses the government funded hours. In addition, the email correspondence between Mr X and the nursery does not state anywhere that the charges for consumables were voluntary. The nursery’s funding policy also does not say anything about the charges for consumables being voluntary.
43. We are therefore satisfied the nursery did not make it clear the charges for consumables were voluntary. As a result, Mr X has had additional charges for consumables imposed on him which amounted to the difference between the government funded rate and the nursery’s private rate, with no opportunity to opt out. We are satisfied this amounts to a top-up fee.
44. When Mr X contacted the Council about his funding and the possibility of paying a top-up fee, in early 2021, the Council simply referred him back to the nursery. It is the Council’s duty to work with providers to ensure all parents have fair access to a free place. The Council did not do this. This is fault. While we would not expect a council to check all providers and their invoices, we would expect a council to properly consider and look into the possibility that a member of the public is paying a top-up fee if they raise concerns with a council.
45. While the Council did meet with the nursery in September 2021, to discuss Mr X’s complaint, it did not provide him with any details of the discussions it had with the nursery and just provided him with general information about how FEEE is calculated. This is fault.
46. Mr X has paid additional charges because of the Council’s fault. This is injustice. We accept Y will have benefitted from some consumables such as meals etc. But given the lack of opt out, we consider it proportionate for the Council to reimburse 50% of the additional charges Mr X incurred from the date he made the Council aware about his funding concerns.

-
47. Mr X has also been put to avoidable time and trouble in his complaint to the Council. The Council did not properly consider his complaint and only provided general information about FEEE. This is also an injustice.

Recommendations

48. To remedy the injustice caused we recommend the Council:
- apologise to Mr X in writing;
 - pay Mr X £100 for his time and trouble in bringing his complaint as the Council did not initially investigate his concerns and referred him back to the nursery;
 - pay Mr X 50% of the consumables charge from January 2021 (when he first contacted the Council about his concerns) until the date Y left the nursery; and
 - work with the nursery to ensure it amends its invoices and receipts, so they are clear and transparent. Invoices and receipts should itemise all charges so parents can see they have received their child's free entitlement and understand any extra charges. If any of the charges are voluntary, this should also be made clear.
49. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Decision

50. We find the Council at fault because it did not meet its statutory duties to ensure Mr X's child had access to a free nursery place. The Council was also at fault for not working with the nursery to ensure its invoices were clear and itemised. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mr X. The Council should take the action outlined above to remedy the injustice caused.

Parts of the complaint we did not investigate

51. Mr X also complained that his older child who was eligible for government funded hours between January 2017 and September 2018 did not receive these. We did not investigate this part of the complaint as too much time has passed from when his child left the nursery until he complained. We are satisfied Mr X could have brought this complaint to us sooner.