

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

**Investigation into a complaint about
Bournemouth, Christchurch and Poole Council
(reference number: 20 012 191)**

10 October 2022

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

Report summary

Education and children's services

Mr X complained that his local nursery asked for a mandatory top-up charge for its free education places which it was not allowed to do. He said he raised this issue with the Council and it failed to take any action to address the problem. Based on the evidence we have seen, the Council is at fault and has caused injustice to Mr X. We recommend financial remedies and an apology.

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 personal injustice caused to Mr X, we recommend that within one month of the date of this report, the Council:

- reimburses Mr X for any "general extras" fees he has paid the nursery to date;
- pays Mr X £200 to compensate for his time and trouble in bringing the complaint; and
- apologises to Mr X.

To ensure the faults identified in this report do not continue and affect future nursery users, we recommend that the Council:

- asks the nursery to change its pricing policy so that it is in line with the Guidance and the Provider Agreement. If the nursery refuses to change its pricing policy, the Council should consider its powers to terminate the Agreement and withdraw funding in whole or in part; and
- writes to other FEEE providers in its area to inform them of our decision and remind them of its expectations in terms of pricing.

The complaint

1. Mr X complained about a nursery's charges when his child accessed their free education entitlement. He said the charges were not voluntary and were a top-up fee. The Council disagreed. Mr X says the Council should ensure that childcare places are free and failed to do so. Mr X says that when he informed the Council of the problem, it failed to take action and refused to consider his complaint under its corporate complaints process.

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. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) as amended*)
4. Under our information sharing agreement, we will share this decision with the Office for Standards in Education, Children's Services and Skills (Ofsted).

Law, guidance and policies

Free Early Education Entitlement (FEEE)

5. The Childcare Act 2006 (as amended), the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014, the Childcare Act 2016 and the Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 set out councils' duties to secure early education provision free of charge.
6. All children who meet certain eligibility criteria may take up a free childcare place. This is known as the Free Early Education Entitlement (FEEE).
7. In 2018 the government issued the Early Education and Childcare Statutory Guidance. Councils must follow the Guidance unless there is a good reason to depart from it.
8. The Guidance says local authorities should:
 - work with providers and parents to ensure that all parents have fair access to a free place, which must be delivered entirely free of charge;
 - 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);
 - ensure that providers are completely transparent about any additional charges, for example, for those parents opting to purchase additional hours or services; and

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- work with providers to ensure their invoices 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.
9. The Guidance also says:
- providers can charge for meals and snacks as part of a free entitlement place and they can also charge for consumables such as nappies or sun cream and for services such as trips and specialist tuition; and
 - parents can be expected to pay for these, although these charges must be voluntary for the parent. Where parents are unable or unwilling to pay for meals and consumables, providers who choose to offer the free entitlements are responsible for setting their own policy on how to respond, with options including allowing parents to supply their own meals or nappies, or waiving or reducing the cost of meals and snacks.
10. The Childcare Act 2006 section 9 says councils must exercise their functions with a view to securing childcare providers' compliance with these requirements.
11. In 2019 we urged councils to have better oversight of nurseries offering free early years places after a nursery chain was found to be charging Leicestershire parents a top-up fee ([19 004 977](#)). In a statement accompanying the report on that case we said:
- “The government's intentions have always been that these places are provided free of charge to parents and it is up to local authorities to administer them accordingly... Free must mean free.”

The Council's Provider Agreement

12. The Council has a Provider Agreement which nurseries sign up to. This Agreement echoes the Guidance in terms of the charges. It says:
- government funding is intended to cover the cost to deliver free flexible childcare;
 - the provider can charge for meals, consumables and services. These charges must be voluntary to the parent; and
 - the Council may terminate the Agreement and withdraw funding in whole or in part if the provider breaches its statutory requirements or the Agreement itself.

The nursery's price policy

13. The nursery has a list of additional extras which parents can buy such as meals (from £1.25 for breakfast to £3.25 for lunch), sun cream (£3 a year), toothbrush (£1.99) and cooking school (£3).
14. The nursery offers funded early education (FEEE) but charges: 'general extras' to any funded FEEE hour claimed during core hours (9.30am to 3pm). 'This charge covers consumables and additional activities that are not covered by the Early Education Funding.' These general extra charges are applied per hour (£1.79) during the weeks the funding is claimed.
15. The nursery allows exceptions to the 'general extras' if:
- a child is accessing the Early Years Pupil Premium;
 - a parent has a second younger child at the nursery that does not access funding;

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- a child accesses 30 hours' funding and attends for 40 hours or more a week.
16. The nursery does not charge 'general extras' to FEEE places outside of core hours.

How we considered this complaint

17. We produced this report after examining relevant documents provided by the complainant and the Council and interviewing the complainant.
18. We have given 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 happened

The complaint

19. In January 2021, Mr X informed the Council that one of its nurseries was charging top-up fees on its free education places, which it called 'general extras' and this was not allowed under government guidance. He asked the Council to investigate the matter.

The nursery's response – February 2021

20. The Council made enquiries of the nursery. The nursery said:
- providers could set what times of day they would accept government funded hours;
 - it offered free entitlement places during the non-core hours. Any charges during those hours were voluntary; and
 - parents also had the option, if they chose to do so, to use their government funded hours towards the cost of nursery provision during core hours. It emphasised it was the parents' choice to make a booking in core hours. If they did so, then a mandatory charge (the 'general extras') applied and this was made clear in the price list.
21. Mr X complained to us and the Council said this complaint would not be considered under its complaints process as it was a complaint about the actions of a provider, not the Council.

The Council's response – July 2021

22. The Council added the following comments to its complaint response to us.
- The provision was consistent with the approach of other providers in the market, the Provider Agreement and the Guidance.
 - 'In effect, [the Nursery] limits the free place provision to the hours prior to 9.30 am and after 3.00 pm; whilst funding is accepted towards other hours if the parent so chooses, this is on the basis that the additional costs are accepted pursuant to the terms of the provider's contract with the parent.'

The Council's response – September 2021

23. We issued a draft decision and found fault with the Council. The Council made the following comments.
- Councils had to 'have regard' to the Guidance, but it was not binding.

- The Guidance said parents could be ‘expected to pay’ for certain items, but then contradicted itself as it said the charges should be voluntary. The Guidance did not say that parents could not pay for extras and there was a lack of clarity as to what providers could charge for.
- It was widely acknowledged that the funding offered by Central Government was inadequate to cover the services that nurseries provided. If we said the nursery’s charges were not in line with the Guidance, this could lead to local authorities being subjected to significant additional costs.
- The Council’s duty was to ensure that providers were aware that they could charge for certain items. The Council does not have a duty to tell providers that charges should be voluntary.
- In any event, the Council’s Provider Agreement made it clear that additional charges should be voluntary so the Council had made the nursery aware of this requirement.
- Even if the Council had provided further reminders to the nursery about the additional charges, it was not certain that the nursery would have changed its position. The Council could not compel the nursery to change its policy.

Conclusions

24. The Council’s position is that the nursery’s provision of FEEE places is in line with the Guidance and the Provider Agreement. The Council therefore did not have to take any action to address the nursery’s practice as the nursery was not doing anything wrong. We have investigated that statement further.
25. We agree that providers can choose to offer FEEE only at certain hours of the day. However, any FEEE hours offered must be free, or only subject to voluntary charges.
26. We agree that providers, can, if certain conditions are met, make additional charges on a FEEE place. Parents are expected to pay for extras such as meals, consumables or services such as trips. We note the nursery has a list of those additional charges in its price list.
27. But the Guidance and the Council’s Agreement both say that charges on a FEEE place should be voluntary and that, if a parent is not willing or able to pay, the provider should offer options within its policy to address this.
28. That was not the case here.
 - The parents could not choose whether to pay the extra charges during core hours.
 - The nursery admitted in its correspondence that the ‘extra charges’ were mandatory, not voluntary.
 - The nursery’s pricing policy did not offer any alternative options to parents whose children accessed FEEE during core hours.
29. We do not accept the argument that the charges were voluntary because the parents ‘chose’ to send their child to the nursery during core hours. If the hours a child attends are being claimed as FEEE hours, the charging for those hours must comply with the FEEE rules, and all charges in respect of them must be voluntary. Accordingly, if the nursery’s core hours were not FEEE hours, then parents could not use their FEEE to pay for those hours. If they were FEEE hours, then there could be no mandatory charges applied in respect of them.

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30. The nursery was offering FEEE places during core hours, therefore it should adhere to the Guidance and Provider Agreement. It should offer the places for free and only make charges in line with the Guidance and Agreement.
31. The Council should also have ensured that the nursery's pricing policy was transparent. The pricing policy did not explain to parents what the 'extra charges' paid for. The nursery provided this information to the Council after Mr X complained.
32. The Council should have worked with the nursery to ensure its invoices were clear, transparent and itemised so that parents could see that they had received their child's free entitlement completely free of charge and understand fees paid for additional hours or services.
33. Once the Council was made aware of the issues by Mr X, it should have addressed them. The Council had a duty to:
- work with the nursery to ensure that parents had fair access to a free place, entirely free of charge;
 - ensure the nursery was aware that it could charge for extras but these charges should be voluntary;
 - ensure the nursery was transparent about additional charges;
 - ensure that the nursery did not charge parents a top-up fee; and
 - work with the nursery to ensure its invoices were clear, transparent and itemised.
34. The Council failed to exercise this duty and this was fault. The Council had powers it could have used to ensure that the Council offered FEEE places correctly and it failed to use those powers.

Injustice

35. Mr X has suffered injustice as he has been wrongly charged top-up fees. Mr X has shared his invoices from the nursery with us. We recommend that the 'general extras' fees that Mr X paid should be reimbursed.
36. The Council is at fault in that it wrongly excluded Mr X from its complaints process on the basis that the complaint concerned a private nursery. While the Council did provide information to Mr X and he was able to bring his complaint to us in good time, there was injustice to Mr X who did not have his complaint investigated properly.

Recommendations

37. We recommend that within one month of the date of this report the Council:
- reimburses Mr X for any "general extras" fees he has paid the nursery to date;
 - pays Mr X £200 to compensate for his time and trouble in bringing the complaint;
 - apologises to Mr X;
 - asks the nursery to change its pricing policy so that it is in line with the Guidance and the Provider Agreement. If the nursery refuses to change its pricing policy, the Council should consider its powers to terminate the Agreement and withdraw funding in whole or in part; and

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- sends a letter to other FEEE providers in its area and inform them of our decision and reminds them of its expectations in terms of pricing.
38. The primary purpose of this report was to examine the wider public interest issues raised by this complaint. Having done that, our expectation is that the Council will focus from here forwards on addressing the underlying faults identified in its contracts for free early years entitlement, and its complaint handling. We do not anticipate conducting further investigations into the same issue, unless the Council fails to address the concerns we have identified, or unless we decide there is significant personal injustice in other complaints we see. Instead, we expect the Council to learn lessons from this complaint to improve services for all residents in future.
39. 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*)

Final report

40. 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 set out above to remedy that injustice.