

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

**Investigation into a complaint about  
Nottinghamshire County Council  
(reference number: 21 016 061)**

**16 September 2022**

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## 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

|      |                         |
|------|-------------------------|
| Ms X | The complainant         |
| Y    | The complainant's child |

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## Report summary

### Education and children's services

Ms X complained the Council has not ensured her childcare provider, a nursery, issues clear and transparent invoices. And, it has not ensured she has fair access to a free place. She says she has spent time seeking clarity and suffered distress due to spending large sums on childcare she 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 Ms X in writing;
- pay Ms X £100 for time and trouble;
- pay Ms X £100 for distress and uncertainty;
- refund Ms X 50% of the additional charges she has paid from January 2020 to the date Y left the nursery in February 2022. The Council should liaise with Ms X and the nursery to gather the information it needs to action this; and
- review the nursery's policies and practices, taking action as needed to ensure it complies with the Council's provider agreement in respect of fees and invoicing. It should tell us the outcome of this review and any actions taken.

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## The complaint

1. Ms X complained the Council has not ensured her childcare provider, a nursery, issues clear and transparent invoices. And, it has not ensured she has fair access to a free place. She says she has spent time seeking clarity and suffered distress due to spending large sums on childcare she 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*)

### Free Early Education Entitlement

3. 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). (Equivalent hours may also be provided over the course of the year.)
4. The funding is to deliver 15 or 30 hours a week of free, high quality, flexible childcare. It is not to cover the costs of meals, other consumables, additional hours or additional services. Parents must pay for these if they choose to receive them. Where parents are unable or unwilling to pay for meals and consumables, providers who choose to offer the free childcare 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.
5. Councils must:
  - ensure providers are completely transparent about any additional charges, for example, for those parents opting to purchase additional hours or additional services;
  - work with providers and parents to ensure all parents have fair access to a free place;
  - 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 providers work with parents to ensure parents understand which hours/sessions can be taken as free provision; and
  - 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.

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6. 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 parents a top-up fee. In a statement accompanying the report on that case, [19 004 977](#) 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.”

### **Council policy**

7. The Council has provider agreements with those settings that agree to provide FEEE.
8. This requires childcare providers to agree that:
- additional charges for consumables must be voluntary for the parent;
  - it cannot charge parents “top-up” fees (the difference between a provider’s usual fee and the funding they receive from the local authority to deliver funded places); and
  - it shall ensure their invoices and receipts are clear, transparent and itemised, allowing parents to see that they have received their funded entitlement completely free of charge and understand fees paid for additional hours.

### **How we considered this complaint**

9. We produced this report after examining relevant documents and speaking to the complainant.
10. 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**

#### **What happened**

11. Ms X says her child Y became eligible for FEEE from January 2020 and then attended the nursery.
12. On 3 August 2021 Ms X complained to the Council that the nursery was not providing a free place and invoices were not clear, transparent and itemised. As a result the nursery had overcharged her for the past 20 months.
13. The Council contacted the nursery which then sent it information about its fees, as sent out to new claimers. This said:
- it had additional charges of £1.80 an hour. Parents could discuss this with the nursery (it did not say whether parents could opt out);
  - it stretched the funding to cover 52 weeks of the year. If parents wanted term time only they had to pay a 50% retainer fee to cover non-term time weeks; and
  - it offered stretched funding and included additional services as standard. It made all parents aware of its policy.
14. On 5 August the Council told Ms X that Y attended nursery for 52 weeks a year and she properly received 22 funded hours a week. The nursery could apply an additional charge for consumables and was acting in line with its provider agreement.

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15. Ms X replied that the nursery had not allowed her to opt out of additional charges and its invoices were unclear and not itemised. She enclosed an invoice dated February 2021. This refers to a nursery fee for Monday to Friday morning only. It does not say the period covered or provide any further breakdown of the fee.
  16. The Council then asked the nursery to evidence how it met its provider agreement regarding charges. The nursery told the Council it would amend its terms to ensure these were in line with the provider agreement going forward.
  17. On 10 August the Council told Ms X the nursery would review its terms. Also, that the nursery had offered to meet with her to discuss her individual circumstances and whether she wanted to opt out of paying the consumables charge for Y. The nursery wanted Ms X to contact it directly to arrange a meeting to resolve the issue and look at invoices.
  18. Ms X told the Council her relationship with the nursery had broken down and she did not want a meeting without the Council's oversight. She did want to opt out of consumables and she also wanted a refund for previous months when the nursery did not allow this.
  19. On 12 August the Council told Ms X she had to resolve matters with the nursery directly or contact us.
  20. On 4 November Ms X emailed the nursery and copied in the Council. She said its invoicing was still unclear and she asked for a refund for its previous overcharging. Ms X then sent the Council a copy of an invoice and asked it to progress her complaint. She said it remained unclear how much the top-up fee was or how to opt out. We note the invoice covers the month of November. It includes a fee for two morning sessions a week; "October 2021 fees", "September 2021 fees" and no fee for 15 hours' stretched funding. It does not provide any further breakdown. And it does not say which, if any, fees relate to additional charges.
  21. On the same date the nursery sent the Council its updated terms. These showed additional charges were now voluntary. However, they still referred to a 50% retainer fee for those looking for a term time place only. (Meaning any parent looking for a free funded place over 38 weeks had to pay additional fees.)
  22. The nursery also responded to Ms X that she could opt out of some charges.
  23. On 5 November the Council told Ms X it was satisfied the nursery had taken action to comply with its provider agreement. It considered the matter closed and she could contact us.
  24. On 17 November Ms X complained the Council had not acted on her complaint. She was still paying too much and she had previously over paid. Invoices were not transparent. And the updated documents were not on the nursery's website.
  25. The Council repeated to Ms X it considered the nursery was acting in line with its provider agreement. It said it could not further consider her complaint under its complaints process. It referred to the nursery's updated contract which made clear additional fees were voluntary. It said it was not responsible for the additional charges and Ms X should direct any further dialogue about this to the nursery or seek alternative provision. She could also contact us.
  26. In comments on our draft report Ms X said Y left the nursery in February 2022.

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## Conclusions

27. The Council received information from Ms X and the nursery in early August 2021 which showed the nursery was not offering parents FEEE. Rather it imposed additional charges and a retainer fee as standard with no opportunity to opt out.
28. While the Council took some action, in asking the nursery to amend its terms, it did not seek to resolve the matter for Ms X or seek to remedy any losses suffered by Ms X. The Council simply referred Ms X back to the nursery. However, it is the Council's duty to work with providers and parents to ensure all parents have fair access to a free place. The Council did not do this. This is fault.
29. In terms of preventing recurrence in future, the Council did review the nursery's updated terms in November 2021. However, there is a lack of evidence it considered whether these met its provider agreement. In particular the Council did not comment on the 50% retainer fee, which would require parents to pay an additional fee on top of the free funded care. We therefore find fault in the Council's decision making.
30. The Council did not investigate Ms X's complaint about invoicing when raised in August 2021. This is fault. The Council simply referred Ms X back to the nursery. However, it is the Council's duty to work with providers to ensure their invoices and receipts are clear, transparent and itemised. The Council did not have due regard to this duty. This is fault.
31. The Council did not address Ms X's complaint about invoicing when raised again in November 2021. This is fault. Further, it assured Ms X the nursery was meeting the provider agreement, appearing to overlook evidence she provided to the contrary. Namely, an invoice that was not clear, transparent or itemised. We find fault in the Council's decision making.
32. Ms X has paid additional charges because of the Council's fault. This is injustice. We accept on balance that Ms X will have benefitted from some consumables, such as meals. However, given the lack of opt out, we consider it proportionate for the Council to reimburse 50% of the additional charges Ms X has incurred.
33. Ms X was put to avoidable time and trouble in her complaint to the Council and in contacting us, because the Council did not properly address her complaints. This is injustice.
34. Ms X has suffered distress and uncertainty due to the lack of clear invoicing. This is injustice. The Council should work with the nursery to ensure their invoices and receipts are clear, transparent and itemised.
35. In response to a draft of this report the Council said the following.
  - It meets its statutory duties through rigorous Provider Support meetings and annual Audits. It applies its Local Provider Agreement with force and will suspend funding for provision which is less than Good (Ofsted) or does not comply with the financial points detailed in the agreement.
  - It investigated the complaint between Ms X and her provider. The nursery is privately run and the Council did not receive any monies from Ms X. Therefore, the request to "refund" her does not apply.
  - It denies fault because:
    - Ms X refused to engage with the nursery to discuss her requirements;
    - local authorities should not intervene where parents choose to purchase additional hours of provision or additional services;

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- 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;
  - the nursery's terms say the additional charges are voluntary;
  - with reference to the documents provided by the nursery, it ensured parents were aware of the nursery's admissions criteria;
  - it found the initial invoice sent by Ms X was not clear or broken down. However, the invoice of November 2021 showed Ms X paid in full for 5.5 hours (Monday and Friday) as itemised on the invoice. It showed the fees for the month were £152 in line with the hourly charge for additional services. And it showed the funded hours as no charge. Y attended for 27.5 hours a week. As Ms X stretched her 30 hour entitlement over the full calendar year, she received 22 funded hours per week and paid a full hourly rate for the remaining 5.5 hours;
  - parents were made aware of the 50% charge for term time only places and were able to use these places flexibly; and
  - it audited the nursery in June 2022 and filed a satisfactory outcome.
36. We have considered the Council's comments but our findings remain largely the same.
37. As referred at paragraph 19, we were aware Ms X chose to ask the Council to resolve her complaint rather than engage further with the nursery. Given the Council's statutory responsibility to act, we do not criticise Ms X for doing so.
38. We acknowledge the Council cannot provide a "refund" but we would expect the Council to reimburse Ms X for losses suffered. We note the Council may seek to recover this sum from the nursery if it wishes.
39. The crux of Ms X's complaint is that the additional charges were not voluntary and she had no opportunity to opt out. She did not have access to a free place. The Council has relied on the nursery's updated terms as referenced in paragraph 22 above. However, the previous terms did not make clear the charges were voluntary.
40. The Council has now detailed its decision making in respect of the invoices. However, this was not communicated to Ms X at the time. And, while the Council has offered an explanation for the November 2021 invoice, Ms X did not find the invoice clear and the invoice alone does not provide the level of detail the Council has offered. It therefore remains for the Council to ensure the nursery meets its provider agreement; ensuring invoices are clear, transparent and itemised.
41. The Council appears to accept the nursery can apply a charge for term time only places even though this means parents cannot access a free place. This appears contrary to the law. It therefore remains for the Council to ensure the nursery meets its provider agreement in respect of charges.

## **Recommendations**

42. To remedy the injustice caused we recommend the Council:
- apologise to Ms X in writing;
  - pay Ms X £100 for time and trouble;
  - pay Ms X £100 for distress and uncertainty;



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- refund Ms X 50% of the additional charges she has paid from January 2020 to the date Y left the nursery in February 2022. The Council should liaise with Ms X and the nursery to gather the information it needs to action this; and
  - review the nursery's policies and practices, taking action as needed to ensure it complies with the Council's provider agreement in respect of fees and invoicing. It should tell us the outcome of this review and any actions taken.
43. 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**

44. We find the Council at fault because it did not meet its statutory duties to ensure Ms X had access to a free place and transparent invoicing at the nursery. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Ms X. The Council should take the action identified in paragraphs 42 to remedy that injustice.