

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

**Investigation into a complaint against
Leicestershire County Council
(reference number: 19 004 977)**

21 October 2020

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 F	The complainant
G	The complainant's daughter

Report summary

Nursery fees and the Free Early Education Entitlement

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. Leicestershire County Council has an agreement with Kiddi Caru Day Nursery and Preschool in Market Harborough to deliver the Free Early Education Entitlement.

Mr F complains he was charged a “top-up” by Kiddi Caru Day Nursery and Preschool in Market Harborough for childcare that should have been free. Both Kiddi Caru and the Council dismissed his complaint.

Finding

We found Mr F was charged a top-up for nursery provision the Council should have ensured he received free of charge. We have made recommendations.

Recommendations

We recommend the Council:

- takes whatever action is necessary to ensure Mr F and any other parents who have been charged “top-up” fees by Kiddi Caru Nursery and Preschool in Market Harborough receive their money back. Parents should be issued with a statement showing the number of free hours each child has received, any additional hours a parent has paid for charged at the published rate, and any refund due. The Council should ensure this happens for children who have joined the nursery since September 2018. The Council should send a copy of the statements to us;
- ensures all parents claiming their Free Early Education Entitlement at Kiddi Caru Nursery and Preschool in Market Harborough receive clear, transparent and itemised invoices and receipts so they can see they have received their child’s free entitlement completely free of charge and understand any fees paid for additional hours or services;
- apologises to Mr F for failing to ensure he received his Free Early Education Entitlement completely free, and for failing to uphold his complaint.

The Council should take these actions within three months of the date of this report.

Kiddi Caru operates nine nurseries in Leicestershire, and more in other counties. Leicestershire County Council secures Free Early Education Entitlement hours from Kiddi Caru and other providers. We recommend the Council reviews the arrangements for invoicing and charging at all other providers of the Free Early Education Entitlement it has an agreement with to ensure they comply with the law and government guidance.

If the Council’s review identifies problems, it should provide us with an action plan to take the same remedial action we have recommended for Mr F’s case. The

Council should carry out the review within three months and, if action is necessary, set out a timetable for action.

Following government guidance, the Council should ensure the Free Early Education Entitlement is not represented to parents as a monetary subsidy in any pricing schedule, invoice or statement issued by any provider the Council uses.

The complaint

1. Mr F complains his daughter did not receive the free childcare she was entitled to receive at Kiddi Caru Day Nursery and Preschool in Market Harborough completely free of charge. He complains the nursery charged a “top-up” – the difference between the nursery’s normal charge and the funding they said they received from the Council to deliver the free places. The Council is responsible for securing the provision free of charge.

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 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, as amended*)
4. We have decided it is in the public interest to name Kiddi Caru in this report. Most parents deal directly with a nursery and may not be aware the Council is responsible for the Free Early Education Entitlement. Naming the nursery will secure wider awareness of the errors we have found among those who might be affected, in this area and elsewhere in the country; ensure public and democratic scrutiny and accountability for the changes we are seeking; and enable full implementation of the service improvements we are recommending. (*Local Government Act 1974, section 30(3)*)

How we considered this complaint

5. We have considered:
 - information provided by Mr F, including correspondence with the nursery and the Council about his complaint, and copies of invoices from the nursery;
 - Leicestershire County Council’s Free Early Education Entitlement (FEEE) Guidance 2019 – 2020;
 - The Childcare Act 2006 (as amended); and
 - *Early education and childcare. Statutory guidance for local authorities* published by the Department for Education in June 2018.
6. We gave Mr F, Kiddi Caru and the Council a confidential draft of this report and invited them to comment. We took account of their comments before finalising the report.

What we found

Free Early Education Entitlement

7. The Childcare Act 2006 (as amended) places a duty on councils to secure early years provision free of charge. Regulations set out how councils should discharge their duty. The government has also issued statutory guidance councils must follow and from which they must not depart unless they have good reason.

8. All children who meet the eligibility criteria can take up a free childcare place if their parent wants one. This is known as the Free Early Education Entitlement.
9. Children are entitled to between 570 and 1,140 hours of childcare over no fewer than 38 weeks of the year depending on their age and eligibility.
10. The eligibility criteria are different for two, three and four year olds, and for children with working parents.
11. 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*)
12. 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*)
13. 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*)
14. 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*)
15. Councils must exercise their functions with a view to securing childcare providers’ compliance with these requirements. (*Childcare Act 2006, s9(2)*)

What happened

16. The Council has an agreement with Kiddi Caru Day Nursery and Preschool, Market Harborough to deliver the Free Early Education Entitlement.
17. Mr F’s daughter, G, attended the nursery for 30 hours a week for approximately 47 weeks of the year. She was entitled to 1,140 hours of free childcare: 30 hours a week for 38 weeks a year under the Free Early Education Entitlement. Mr G expected to pay for the balance (30 hours a week for nine weeks of the year).

Mr F’s complaint

18. Mr F complained to the nursery and then to the Council because he suspected the nursery was charging a top-up and G was not receiving her free hours completely free of charge. His invoices only showed a total amount. They did not show how the charges were calculated. Mr F suspected he was overcharged.
19. The nursery manager and company finance director responded to Mr F’s complaint. They explained the nursery’s charging policy. They said the nursery had reduced Mr F’s invoice at the rate of £3.50 for every “funded” hour. The finance director said he had discussed the matter with the company’s chief executive officer who had reviewed Mr F’s correspondence. They said the nursery had been audited by the Council, as had all the nurseries in the Group in the Council’s area. The nursery did not uphold Mr F’s complaint.

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20. Mr F complained to the Council. The Council quoted the nursery's charging policy. It explained how the nursery subtracts the £3.50 the Council pays for each hour of free childcare (although it did not say what the nursery subtracted the amount from) and explained that parents are charged for additional hours.
 21. The Council quoted advice from the Department for Education which said, "The rate, or contract price, which is paid to early years providers [...] is the amount the provider is paid to deliver a service [...] and is not intended to be passed on to parents/carers. [...] This is why the statutory guidance states that local authorities should ensure that the free entitlement is not represented to parents as a monetary subsidy. Statements or invoices should therefore clearly show the amount of FREE hours taken for that period."
 22. The Council did not uphold Mr F's complaint.
 23. Dissatisfied with the Council's response, Mr F complained to us. He said he had paid the nursery more than £2,100 over the course of the year for care which he believed should have cost £1,200.

Consideration

24. Mr F sent us a selection of invoices from the nursery and a copy of a letter to parents explaining the nursery's charging policy.
25. We are only concerned with the provision of the Free Early Education Entitlement. We are not concerned how the nursery operates its private business, including charges for provision over and above a child's free hours. We have, however, referred to these charges where they are inextricably linked to the Free Early Education Entitlement.

Clear and transparent invoices

26. To help parents with financial planning, the nursery "spreads" the Free Early Education Entitlement, allowing parents to take their free hours in the holidays as well as term time. The nursery also spreads the charges for any additional hours a parent buys into equal monthly payments.
27. There is only one figure on the invoices sent to Mr F: the total amount payable. The invoices do not itemise the charges or show how they were calculated. It is not possible to see whether Mr F's daughter has received her free entitlement completely free of charge or to understand what Mr F has paid for any additional hours. The invoices are neither clear nor transparent.
28. When we made enquiries, the Council sent different documents, provided by the nursery, which Mr F has not seen. These look more like *statements of account* than invoices. These documents are not clear or transparent either. It is not possible to see how the amounts were calculated or whether Mr F's daughter has received her free entitlement completely free of charge.
29. 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. The Council has audited the nursery and considered Mr F's complaint and has failed to identify the problems with the nursery's invoices or charges. As a result, the Council has failed to work with the nursery to ensure that its invoices and receipts are clear, transparent and itemised. The Council has failed to comply with government guidance. This is fault.
30. Following our enquiries, the Council accepted the nursery's charges "may be perceived as complex by parents" and said it would provide the nursery with

advice. We welcome the Council's offer, but we decided to continue our investigation and publish this report because the Council maintained Mr F had not been charged a top-up. The evidence shows that he was.

Top-up fees

31. A letter from the nursery to parents explained how the nursery calculates the charges. The nursery starts by calculating the "normal fee". This is the total cost of childcare a parent chooses, calculated at the rate the nursery charges parents. In Mr F's case, this was £4.58 per hour. The nursery then calculates how much "funding" the child will receive from the Council. This is the number of hours of free childcare the child is entitled to multiplied by £3.50, which is the amount the Council pays per hour. The nursery then subtracts the Council "funding" from the "normal fee" and invoices parents for the balance.
32. The nursery charges £4.58 but credits only £3.50 from the Council for each free hour provided under the Free Early Education Entitlement. The parent pays the balance. A top-up.
33. Having examined the nursery's charges, we find G did not receive her Free Early Education Entitlement completely free of charge. Mr F paid a "top-up" fee of the difference between the provider's normal charge to parents and the funding they said they received from the Council to deliver free places. He has paid approximately £1.08 for each "free" hour G received. The Council has failed to ensure G received her free place completely free of charge. This is fault.
34. We noted the nursery also published information which described a different method for calculating charges. We found this method, too, would mean the nursery charged a top-up and children would not receive their free places completely free of charge if it was used.

The Council's response to Mr F's complaint

35. In response to Mr F's complaint, the Council described the Free Early Education Entitlement as a monetary subsidy the nursery is passing on to parents. The Council quotes advice from the Department for Education which says this must not happen. The Council does not appear to recognise the contradiction in its response.
36. It should have been obvious to the Council there were problems with the nursery's charging policy when it referred to the amount the Council pays per hour. As the 30 hours of childcare must be completely free to the parent, the amount the Council pays is irrelevant.
37. Parents should receive clear, transparent and itemised invoices allowing them to see they have received their child's free entitlement completely free of charge and understand fees paid for additional hours or services. The Council should ensure this happens when the nursery is delivering the Free Early Education Entitlement on its behalf.
38. Mr F was charged a top-up and the invoices he received were not clear, transparent and itemised. The Council failed to recognise this when he complained. The Council's response to Mr F's complaint was inadequate.

Other people who may have been affected

39. The Council has audited the nursery and other nurseries in the same group. The Council failed to identify the nursery's charging policy does not comply with government guidance and its invoices are not clear, transparent and itemised. This means that potentially other parents at the same nursery and parents at

other nurseries in the same group may also have been charged “top-up” fees, not just Mr F. It reflects badly on the quality of the Council’s audit.

The Council’s response to our investigation

40. Throughout our investigation, the Council has steadfastly denied the nursery charged Mr F a top-up.
41. The Council sent complicated calculations to justify the invoices which bore no relation to the charges Mr F had paid.
42. The Council described the free education entitlement as a monetary subsidy the nursery is passing on to parents despite advice from the Department for Education saying this must not happen.
43. The charges were flawed. It was wrong, therefore, of the Council to try to justify the charges to us. The Council’s failure to acknowledge the problem with the nursery’s charges means it has not fulfilled its obligation to work with the nursery to ensure the charges are clear and transparent and parents receive their child’s free entitlement completely free of charge.
44. We are publishing this report because the Council has not yet accepted our findings or recommendations. We also wish to record the Council’s unhelpful response to our investigation. In doing so, we hope to increase understanding of our role and encourage better complaint handling. We welcome, and indeed expect, robust challenge from both sides when we investigate complaints. However, we are primarily concerned with establishing what happened. In this case, the Council has tried to justify a position it has taken without full regard to the facts of the case.
45. The calculation of Mr F’s charges should have been extremely straightforward. G has used the nursery for 30 hours (or three full days) per week for 47 weeks. Thirty eight of the 47 weeks should have been completely free. Mr F had to pay for the remaining 9 weeks. All the Council had to do to calculate how much Mr F should pay and check he received his free childcare completely free of charge is multiply the published daily rate by the number of days per week (3) by the number of extra weeks (9) Mr F used. This would give the total cost to Mr F of G’s care which could then have been “spread” to assist Mr F with financial planning.

Conclusions

46. The law and government guidance place clear obligations on the Council to:
 - ensure the Free Early Education Entitlement is delivered completely free of charge; and
 - ensure nurseries delivering the Free Early Education Entitlement are clear and transparent about their charges.
47. The Council has not fulfilled these obligations in respect of the Free Early Education provided by Kiddi Caru for Mr F’s daughter.
48. We find fault in the way the Council has carried out its functions. The fault has caused Mr F an injustice. He has paid for nursery care which should have been free. Other parents may have suffered the same injustice. We have made recommendations to the Council.

Recommendations

49. We have published guidance to explain how we recommend remedies for people who have suffered injustice as a result of fault by a council or a body acting on behalf of a council. Our primary aim is to put people back in the position they would have been in if the fault had not occurred.
50. We recommend the Council:
- takes whatever action is necessary to ensure Mr F and any other parents who have been charged “top-up” fees by Kiddi Caru Nursery and Preschool in Market Harborough receive their money back. Parents should be issued with a statement showing the number of free hours each child has received, any additional hours a parent has paid for, and any refund due. The Council should ensure this happens for children who have joined the nursery since September 2018. The Council should send a copy of the statements to us;
 - ensures all parents claiming their Free Early Education Entitlement at Kiddi Caru Nursery and Preschool in Market Harborough receive clear, transparent and itemised invoices and receipts so they can see they have received their child’s free entitlement completely free of charge and understand any fees paid for additional hours or services.
 - apologises to Mr F for failing to ensure he received his Free Early Education Entitlement completely free, and for failing to uphold his complaint.
51. The Council should take these actions within three months of the date of this report.
52. Kiddi Caru operates nine nurseries in Leicestershire, and more in other counties. Leicestershire County Council secures Free Early Education Entitlement hours from Kiddi Caru and other providers. We recommend the Council reviews the arrangements for invoicing and charging at all other providers of the free early education entitlement it has an agreement with to ensure they comply with the law and government guidance.
53. If the Council’s review identifies problems, it should provide us with an action plan to take the same remedial action we have recommended for Mr F’s case. The Council should carry out the review within three months and, if action is necessary, set out a timetable for action.
54. Following government guidance, the Council should ensure the Free Early Education Entitlement is not represented to parents as a monetary subsidy in any pricing schedule, invoice or statement issued by any provider the Council uses.
55. 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

56. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mr F. The Council should take the action set out above to remedy that injustice.