

# AUDIT AND GOVERNANCE COMMITTEE



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| Report subject    | <b>To consider and accept a report published by the Local Government and Social Care Ombudsman</b>  |
| Meeting date      | 24 July 2025  |
| Status            | Public Report   |
| Executive summary | <p>The purpose of this report is to formally present a report published by the Local Government and Social Care Ombudsman on 8 May 2025, about Education and Children's Services. The Ombudsman found that the Council had failed to take any action when a concern was raised when a nursery asked for a mandatory top-up charge for its free education places which it was not allowed to do. The Ombudsman has found that the Council was at fault and has caused injustice to the parent, Mr .X. The Local Government and Social Care Ombudsman has asked the Council to accept its findings.</p> <p>The published report can be found at Appendix 1 to this report.</p>  |
| Recommendations   | <p><b>It is RECOMMENDED that the Committee:</b></p> <ul style="list-style-type: none"> <li>a) Considers and accepts the report published by the Local Government and Social Care Ombudsman published on 8 May 2025, which appears at Appendix 1 to this report;</li> <li>b) Approve the reimbursement to Mr X of any "general extras" fees he paid to the nursery from 12 February 2021;</li> <li>c) Approves the payment of £200 to compensate Mr X for his time and trouble in bringing the complaint</li> <li>d) Notes that an apology will be made to Mr X</li> <li>e) Notes the Council has asked the nursery to change its pricing policy so that it is line with the Guidance and Provider Agreement;</li> <li>f) Notes the Council has met with other FEEE providers in the area to inform them of the LGSCO decision and remind them of the Ombudsman's expectations in terms of pricing.</li> </ul> |

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| Reason for recommendations | This report has been published following very lengthy legal proceedings and the Court supported the views expressed by the Local Government and Social Care Ombudsman. |

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| Portfolio Holder(s): | Councillor R Burton, Portfolio Holder for Children Education and Skills |
| Corporate Director   | Graham Farrant, Chief Executive   |
| Report Authors       | Janie Berry, Director of Law & Governance and Monitoring Officer        |
| Wards                | Not applicable  |
| Classification       | For Decision  |

## Background

1. In accordance with its statutory powers, the Local Government and Social Care Ombudsman has published a report setting out its findings in respect of an Education and Children's services issue. The published report appears at Appendix 1 of this report.
2. In this particular instance, 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. Mr X said he raised this with the Council and it failed to take any action to address the problem. Based on evidence reviewed, the Ombudsman found that the Council was at fault and has caused injustice to Mr X. This resulted in the recommendations of financial remedies and an apology as detailed within this report. The official finding of the Local Government and Social Care Ombudsman is "Fault found causing injustice and recommendations made".
3. The report at Appendix 1 sets out the details of the complaint as well as the Ombudsman's Role and Powers, the relevant law, guidance and policies which includes specific reference to the Free Early Education Entitlement [FEEE] Guidance issued by the Government in 2018.

## Summary of the Judicial Review Proceedings

4. The judicial review proceedings arose out of a draft report from the Local Government and Social Care Ombudsman. The Ombudsman is a statutory body which considers complaints about local authority services from members of the public. If it upholds a complaint, it will generally find fault causing injustice.
5. In this case, Mr X complained to the Council in early 2021 that he was not receiving the Government's Free Early Years Education Entitlement for his child at a private nursery in the Council's area. This entitlement allows parents of nursery age children to a number of free hours education every week, at the time of the complaint 15 hours. The entitlement is funded by Government and administered by the Council which passes the funding to nurseries for children whose parents have the entitlement. Mr X's complaint was that the nursery had charged him for "extras" such as meals and certain activities during the free entitlement hours. He said that the free entitlement meant that the nursery was not entitled to do this.
6. The Council considered his complaint, albeit that because the nursery was a private provider it did not do so through the Council's corporate complaints process. In

considering the complaint, it looked at the statutory scheme and Government guidance about the free entitlement. It took the view that the guidance allowed mandatory charges for “extras” of this nature and did not uphold Mr X’s complaint.

7. Mr X then complained to the Ombudsman, both about the way in which the complaint was handled by the Council, and about the underlying issue of whether the nursery was entitled to charge him for “extras”.
8. In correspondence with the Ombudsman, the Council accepted that it should have considered the complaint under its corporate complaints process. However, it did not accept that the legislative scheme for the early years entitlement, and the accompanying government guidance, barred providers from making compulsory charges for “extras” during entitlement hours.
9. The Ombudsman’s draft report nevertheless upheld Mr X’s complaint, and the Council challenged the draft report by way of judicial review proceedings. In the proceedings, the Council said that the legislation and guidance did not make it clear that nurseries’ charges for “extras” always had to be voluntary.
10. The Court gave judgment in February 2025, refusing the challenge and deciding that the Ombudsman was right to conclude that the legislation and guidance meant that any charges for “extras” during free entitlement hours had to be voluntary.
11. The Ombudsman’s report was published on 8 May 2025 and found that Mr X had suffered fault causing injustice. In common with most Ombudsman reports where fault and injustice are found, it made recommendations about the action which the Council should take namely:
  - reimburses Mr X for any “general extras” fees he has paid the nursery to date. Within the judicial review proceedings, the Ombudsman clarified its expectation that the Council should only repay fees from 12 February 2021, which is when the Council responded to Mr X’s concerns about the mandatory charges but failed to identify the issues.
  - 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
12. Writes to other Early Education Entitlement Funding providers in its area to inform them of our decision and remind them of its expectations in terms of charging policy.
13. In response to the Recommendations, the Council has already met with all FEEE providers in the area and informed them of the decision made.
14. New statutory guidance from the DfE has been published and this has been shared with all BCP providers. We have also run four providers meetings giving details in relation to this guidance, and offering advice and support on how to be compliant.

15. New provider agreements have been written and are being sent in the summer term for providers to sign to indicate their agreement to the new statutory guidance for charging.

### **Options Appraisal**

16. In this instance, there is very little discretion available to the Committee other than to accept the report and findings of the Local Government and Social Care Ombudsman. The reason for this is that the matter has previously been litigated via judicial review where the Council's challenge of the Local Government and Social Care Ombudsman failed.

### **Summary of financial implications**

17. Subject to the Committee's approval, the Council is required to pay Mr X £200 in compensation together with the reimbursement of fees incurred since 12 February 2021, which is estimated to be in the region of £2489 however this will be clarified with Mr X subject to the recommendations of the Audit & Governance Committee.

### **Summary of legal implications**

18. Following publication of the report on 8 May 2025, the Council published a statutory notice in the Bournemouth Echo and the New Milton Advertiser and Times on 22 May 2025 in accordance with the provisions of the Local Government Act 1974.
19. The Local Government and Social Care Ombudsman has issued its report in accordance with the provisions of the Local Government Act 1974. Pursuant to s31 (2) Local Government Act 1974, the Council is required to formally consider the report at a decision-making level. The Audit and Governance Committee has been deemed as the appropriate decision-making body by virtue of paragraphs 5.34 and 5.36 of the Committee's Terms of Reference.
20. The impact of the final decision of the judicial review proceedings, the decision of the Court is now legally binding across all FEEE providers in England.
21. In May 2025, Cabinet approved the revised BCP Complaints Procedures following the centralisation of the Council's complaints function in April 2025.

### **Summary of human resources implications**

22. There are none directly arising from this report

### **Summary of sustainability impact**

23. There are none directly arising from this report

### **Summary of public health implications**

24. There are none directly arising from this report

### **Summary of equality implications**

25. There are none directly arising from this report

### **Summary of risk assessment**

26. There are no risk assessment issues directly arising from this report as this is reporting on a decision already determined by the Local Government and Social Care Ombudsman. However, as this decision is now legally binding, there is a risk of future litigation should there be a recurrence of these circumstances relating to provision of FEEE.

### **Background papers**

BCP Council Constitution

13 May 2025 – Cabinet – Agenda, Reports and Minutes (review of the Complaints Procedure)

### **Appendices**

Appendix 1 – Report published by the Local Government and Social Care Ombudsman on 8 May 2025, dated 10 October 2022