

From: Gordon Ashworth
Director – Consumer Group

28 July 2020

Dear Sir/Madam

CMA open letter to the early years sector

1. The purpose of this letter is to help nurseries and early years providers understand how consumer protection law applies to the arrangements they have with consumers during the COVID-19 pandemic. The crisis has highlighted the importance of providers ensuring their contracts meet the requirements of consumer law and that they recognise consumers' rights in the current situation.
2. This letter (and the advice which accompanies it) does not introduce new laws or rules for providers, but rather they explain how the current law applies in the present circumstances. In particular, the advice addresses specific issues which have been drawn to the CMA's attention by consumers as being problematic. The CMA is therefore asking providers to consider their contracts and arrangements with consumers and take any necessary steps to ensure they comply with the law.
3. The CMA recognises that we are in unprecedented times and, like most areas of the economy, the nursery and early years sector has encountered financial pressures and uncertainty. We understand that many providers and consumers will have discussed how best to handle the problems they each face and devised arrangements which work well for everyone. The CMA is not

seeking to disrupt arrangements made freely between providers and consumers in such circumstances. However, it is important that all parties are aware of how the law applies in the current situation and the rights of consumers when reaching an agreement.

4. The focus of this advice is on the issues consumers have raised with the CMA relating to the pandemic. It does not attempt to address the application of consumer law to every aspect of the relationship between providers and consumers in normal times (nor will this advice be regularly updated). In the longer term we would advise providers to review their arrangements and contracts to ensure they are compliant with consumer law at all times.

Consumer law and the nurseries and early years sector

5. On 20 March 2020, the CMA established its [COVID-19 Taskforce](#). Its purpose is to monitor market developments in the wake of the pandemic, to identify any commercial practices that adversely affect consumers, and to consider appropriate responses to help businesses comply with the law and protect consumers' rights.
6. Through this work we received reports alleging some unfair practices by a minority of nurseries and early years providers, mainly relating to payments and cancellations in the context of Covid-19 lockdown restrictions. As a result, on April 30 2020 the CMA published a [statement on how the law applies to consumer contracts, refunds and cancellations](#) and announced it would examine nurseries and early years providers as one of three sectors of concern.
7. Our investigation found that, whilst the vast majority of providers were striving to reach fair arrangements with consumers in very challenging circumstances, there remained concerns that some were treating consumers unfairly. We are also aware that in many cases, consumers and providers have sought to reach new agreements on their childcare arrangements. If they choose to do so it is important that providers understand the legal position and consumers

understand their rights under the law. We have therefore published further advice to the sector to help ensure consumers are treated fairly.

8. We are encouraging nursery and early providers, along with consumers, to familiarise themselves with the advice and take any necessary steps to ensure compliance with consumer law. Where providers are not compliant they may risk action by the CMA or any other enforcer under consumer protection law, e.g. local authority trading standards services. Independent of any action which the CMA may consider, providers need to be aware that consumers can take action themselves, through the courts if necessary, to challenge breaches of contract and terms which they think are unfair.

9. We identified three main themes which have caused some problems in the sector. These are explained in more detail in our advice. In summary the issues are -
 - (i) **Providers requiring full or excessively large fees for services which are not being carried out due to the pandemic public health restrictions and government guidance.**

10. Our view is that –
 - Consumers should not have to pay for services that cannot be provided
 - Consumers should also be offered a refund where services are paid for in advance but do not take place as agreed in the contract.
 - Contract terms requiring consumers to pay providers who are not providing the services agreed in the contract are likely to be unfair and unenforceable.

11. We are aware that some contracts in the sector allow for a payment contribution to cover costs during a temporary interruption in service. As we are seeing during the pandemic, an interruption in service may also include providing services in different ways to what was previously agreed (for example, temporary changes to how the service is delivered such as home learning support).

12. **The CMA would be unlikely to object to a term which allows the business to request payment of a small contribution to its costs whilst the service is disrupted for a limited period.** However, this contribution:

- must be low (no more than direct unavoidable costs to the business during the disruption such as mortgages/rents, where relevant 'holiday periods' could not be agreed, utilities, insurance premiums. These costs should not seek to cover costs which are reimbursed in other ways such as the government financial support schemes (for example the furlough scheme) or costs reimbursed to the business by insurance.
- apply for a specified and modest time period, and
- stop being charged if the consumer decides to exit the contract to avoid further payment.

13. Our investigation also found that businesses and consumers agreed to revise their contracts with some parents voluntarily agreeing to continue to make some payments. **The CMA is unlikely to object to voluntary arrangements provided they are fairly agreed, and the business does not pressurise the consumer in any way to accept the new arrangement.** Consumers cannot be forced to agree to new arrangements and any terms that allow the business to impose new terms or unreasonably increase prices are likely to be unfair and not binding on the consumer.

(ii) Providers relying on unfair cancellation terms, such as requiring unreasonable notice to be given, or high cancellation fees in cases where the business is unable to provide the service.

14. In general, notice periods and cancellations fees may be appropriate in normal circumstances, where the business is still able to provide a service but the consumer decides they want to stop receiving it. Cancellation terms must however be fair and brought to consumer's attention. Notice periods should

be no longer than reasonable for the business to find a replacement child if the business continues to provide a service. Additional fees should also not be charged if a child continues to attend during the notice period. Where a child does not attend or a service is not provided during a cancellation period reductions should be offered to reflect lower business costs (such as food for the child) or no service being provided.

(iii) Providers putting unfair pressure on consumers to agree to make payments by threatening that the child's place will be lost or the provider will go out of business.

15. Consumers are likely to be invested in their child continuing to attend a specific nursery or childcare service for a variety of reasons. Our view is that where legislation or other lockdown measures mean parents cannot make use of these services for a period of time, it is likely to be an unfair and illegal practice to warn or threaten to remove a child's place unless the parent continues to pay full or substantially full fees during periods of lockdown. Also, despite the financial pressures caused by the crisis, providers should not demand that consumers should pay high fees by warning that if they do not pay the fees the business will cease trading and/or livelihoods will be lost. To do so may breach consumer law.

Next Steps

16. Providers of early years services should examine their agreements with parents and ensure they comply with consumer law. The CMA is not announcing any enforcement action at this stage but will continue to monitor the sector.

17. Businesses should also be aware that in addition to any action which the CMA or local authority trading standards services may take, individual consumers will have the option of pursuing a claim against businesses for alleged breaches of consumer law.

18. For further advice please visit our guides on [consumer protection law](#) or contact your local trading standards service. If you wish to redraft your contracts in light of this advice, please refer our [unfair contract terms guidance](#) and in particular [our guidance for businesses on how to write fair contracts](#).

Yours faithfully

Gordon Ashworth
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