

**Subject:** FW: ACTION REQUIRED - Funding Decision and Related Matters - Pear Tree Nurseries Limited - East Lothian - BRIG/23/2

**Importance:** High

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**From:**

**Sent:** 25 July 2022 09:04

**To:**

**Subject:** FW: ACTION REQUIRED - Funding Decision and Related Matters - Pear Tree Nurseries Limited - East Lothian - BRIG/23/2

**Importance:** High

Please see email below Are you able to respond to the points raised We have a meeting with this afternoon I wonder if you are free to attend it is at 2.30pm

Thanks

Principal Officer, School Admissions and Planning  
Education Business Unit  
John Muir House  
Haddington  
EH41 3HA

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**From:**

**Sent:** 25 July 2022 08:51

**To:**

**Subject:** FW: Funding Decision and Related Matters - Pear Tree Nurseries Limited - East Lothian - BRIG/23/2

**Importance:** High

For discussion this afternoon,

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**From:**

**Sent:** 22 July 2022 17:54

**To:**

**Cc:**

**Subject:** Funding Decision and Related Matters - Pear Tree Nurseries Limited - East Lothian - BRIG/23/2

**Importance:** High

BY EMAIL ONLY:

Dear

I refer to your email of 20 July to \_\_\_\_\_ of ICP Nurseries.

I note that your email alleges breaches of criteria 6 of the National Care standards for Early Learning and Childcare, the 'Additional Support for Learning Act (2014)' (sic), the Equality Act 2010 and the contract between East Lothian and the Provider. As a result, you intimated that partnership funding for three Pear Tree nurseries will not be issued under the Contract on 25 July and that the agreements between the Council and the nurseries, which end on 31 July 2022, will not be renewed until *'the situation is resolved'*. I note that you have now reversed that decision, in relation to funding, until the end of the agreements.

As a preliminary matter, can you kindly direct me to the relevant delegated authority by virtue of which you as Education Service Manager and Principal Educational Psychologist had the necessary *vires* to take and issue these decisions on behalf and in the name of the Council?

You had previously indicated that no further discussion regarding the issue will take place prior to 1 August, when your colleagues \_\_\_\_\_, Head of Education and \_\_\_\_\_ Quality Improvement Officer for Early Years Education return to the office from annual leave.

As you are aware, the Care Inspectorate identified issues with the service provided at the West Road setting during an inspection in April 2022. At the time of the inspection, some reasonable accommodations had already been made in respect of staff ratios to address specific issues around \_\_\_\_\_ at the setting. Despite those accommodations and further changes being made to staffing, the care in place remained insufficient to address the needs \_\_\_\_\_ whilst ensuring the welfare of the other service users.

The decision communicated to the parents on 19 July was discussed with \_\_\_\_\_ prior to the \_\_\_\_\_ being informed. Reference is made in \_\_\_\_\_ email to previous discussions with you as Education Service Manager and Principal Educational Psychologist regarding the service issues at West Road and the lack of the required skill set within the team to meet the needs of the \_\_\_\_\_ within that setting.

No formal Improvement Plan was put in place with the Council but communication with your colleagues has been open and ongoing following the Care Inspectorate report.

The decision was supported by \_\_\_\_\_ of the Care Inspectorate who discussed the matter with Regional Manager, \_\_\_\_\_. Whilst your email of 22 July states that the Care Inspectorate does not support the decision made, that is not our understanding of the position.

\_\_\_\_\_ there are other issues that have undermined our efforts to address the gap in provision at the setting, such as the recruitment of staff in general and in particular, those with applicable skill sets for ASN children. As a result of these factors, Pear Tree is placed in a position where the setting is no longer appropriate for \_\_\_\_\_ as they are not able to provide any further reasonable accommodations to ensure \_\_\_\_\_ safety and wellbeing.

## Contract Terms

I have reviewed East Lothian Council’s overarching Terms and Conditions for Funded Providers (“the Terms”) and the separate, signed Early Learning and Childcare (EL&C) Funded Provider Agreements (“the Agreements”) with East Lothian Council for each of the settings affected by your decision making in relation to funding until the end of this contract and discussions in relation to withdraw funding.

### *East Lothian Council’s Terms and Conditions for Funded Providers*

Clause 4.1 of the Terms sets out that the Provider shall meet all of the National Standard criteria for the duration of Contract, as outlined in Schedule Part 3 (National Standard Criteria).

Paragraph 4.2 provides that, “where a Provider fails to demonstrate that they meet any of the National Standard criteria or sub-criteria, then, at the discretion of the Council, the Provider will be placed into a Service Improvement Period as outlined in clause 5 (Service Improvement Period).” The right of the Council to exercise its right to impose a Service Improvement Period is set out in Clause 5 and, where a complaint has been received, the right to impose such a period may be executed where the Council confirms that one or more National Standard Criteria is not being met after a review or investigation by the council. This Clause appears to have been left out of account in reaching your decision summarily to withhold funding. Please explain your reasons for disregarding, or alternatively for electing not to exercise, the SIP option?

Clause 9 of the Terms sets out the Provider’s duty to comply with law and guidance in relation to the protection of children and ensuring their welfare.

Clause 10.5 requires that the Council is provided with reports from regulators. \_\_\_\_\_ was made aware of Care Inspectorate involvement in \_\_\_\_\_

\_\_\_\_\_ The Council was made aware of the 27 April 2022 Inspection Report and the Recommendations therein. Reasonable accommodations were made in accordance with the 2004 Act, however, the provisions in place did not meet the needs of \_\_\_\_\_ and, following further work to bring the provision to the required level, including the recruitment of staff with the necessary skills, the position remained unsatisfactory to \_\_\_\_\_

Resolution of disputes under the contract is covered in Clause 30 of the Contract Terms. It sets out that parties shall attempt in good faith to negotiate a settlement to any dispute within twenty working days and shall involve the Council’s Chief Operating Officer and a Director of the Provider in instances of a service complaint. Please explain why this process was not followed.

Clause 30.2 sets out that nothing shall prevent the parties to the Contract from complying with, observing and performing all their obligations and administrative functions in respect of the Contract regardless of the nature of any dispute, nor does it prevent referral of the dispute to a relevant Court. Accordingly, all sums due under the Contract should be paid timeously.

### *Early Learning and Childcare (EL&C) Funded Provider Agreements*

There are separate agreements for each of the three settings within East Lothian. Your decision to withhold funding applied to all settings, including two with no complaints or ongoing issues in relation to service provision. The decision to withhold the funding is irrational and unreasonable and manifestly so for the other two sites.

Clause 11 of each Agreement covers Social Inclusion and Additional Support Needs. The clause provides that the Provider shall “*make appropriate provision for children with additional support needs. The Funded Provider should refer to 'Supporting Children's Learning: Code of Practice' – Guidance relating to the Education (Additional Support for Learning) (Scotland) Act 2009 (Revised 2010) and the Children & Young People Act (Scotland) 2014*”. The 2009 Act as referenced made amendments to the principal Education (Additional Support for Learning) (Scotland) Act, but it should be noted that the principle of making reasonable accommodations for children with ASN remains.

Clause 15 of the Agreement sets out the provisions of the Agreement that relate to termination. Clause 15.3 sets out that, where the Council is alerted to a quality issue that may constitute grounds for the termination of the Agreement, it “*shall endeavour to follow the steps set out in the Improvement Protocol set out at Schedule Part 2*”. Your decision to exercise discretion so as to ignore the Improvement Protocol in Schedule 2 in respect of West Road and the terms of Clause 15 in relation to Meadow Road and Church Street is again irrational and unreasonable.

Schedule Part 1 of the EL&C Funded Provider Agreements with East Lothian Council provides that, ‘*subject to compliance with this Agreement, the Council shall pay the Funded Provider, £5.31 per hour, plus the cost of a meal and a snack and a meal for each eligible child for a maximum of 1140 hours per annum*’. No breach of contract has been evidenced and your decision in relation to the withholding of funding is premature.

#### *Your Decision*

Your decision to withhold funding was premature and entirely unreasonable in all the circumstances. The decision is contrary to the Terms of the contract entered into by the Council and the Agreement in place with each of the nurseries operated by Pear Tree Nurseries Limited within your boundaries. You have failed to exercise any due process as set out in the Terms or Clause 15 and Schedule 2 of the Agreements in place with each of the settings.

Please explain in the fullest terms why your decision was summarily applied to all nursery settings in light of the alleged breaches, without investigation or review as required by the relevant clauses of the Contract Terms. Your approach has also been, with respect, tainted by a disregard for natural justice in respect of the lack of opportunity presented to Pear Tree to defend itself and put its case to you before a decision was taken. Your decision to withhold funding and delay consideration of renewal of the contracts with Pear Tree will potentially impact on hundreds of children and their caregivers who will be informed of the Council's actions prior to funding possibly being discontinued for their spaces.

We note that you have reversed your decision and you now say that you are open to holding a discussion in relation to continuation of the contracts in place for the three settings in East Lothian. That is, of course, welcomed. You will gather from the terms of this email that Pear Tree had hitherto been considering a petition for judicial review, suspension and interdict. We hope that will not now be necessary and our client looks forward to working constructively with you in relation to your provision within your council area. They hope to continue to provide the services to the required standards across all of their settings and, where improvement is required, will work with you and the Care Inspectorate to address the issues identified.

Regards,