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Local Government &
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OMBUDSMAN

[Home](#) [Decisions](#) [Adult care services](#) [Charging](#) [17 005 594](#)

Knowsley Metropolitan Borough Council (17 005 594)

Category : [Adult care services](#) > [Charging](#)

Decision : **Upheld**

Decision date : **02 Feb 2018**

The complaint
The Ombudsman's role and powers
How I considered this complaint
What I found
Recommended and agreed action
Final decision

The Ombudsman's final decision:

Summary: The Council acted with fault in its management of the transfer of a resident from continuing healthcare funding to Council funding, financial assessment; identification of affordable choice, risk assessment and offer of an affordable care

home.

The complaint

1. In summary, the complaint is when managing a transfer from NHS Continuing Healthcare to Council funded residential care the Council failed to:
 - Provide the complainant with support in identifying and moving her mother to a suitable new care home;
 - Properly assess the complainant's finances and calculate her assessed contribution towards her care costs;
 - Properly explain the rules about top-up fees where the costs of care exceed the Council rate for a care home;
 - Provide advice and assistance in identifying alternative accommodation.
2. The complainant I shall refer to as Mrs X, represented by her daughter, whom I shall refer to as Mrs Y. Mrs Y says the faults have caused her and Mrs X stress and anxiety over her continuing care and confusion.

[Back to top](#)

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I 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)
4. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (Local Government Act 1974, section 30(1B) and 34H(i), as amended)

[Back to top](#)

How I considered this complaint

5. In considering this complaint I have:

- Spoken with Mrs Y and read the information presented with the complaint;
- Put enquiries to the Council and reviewed its responses;
- Researched the relevant law, guidance and policy;
- Shared with Mrs Y and the Council my draft decision and reflected on any comments received.

[Back to top](#)

What I found

6. Most people pay something towards the cost of a care home. Where they cannot afford the full cost the Care Act 2014 says the council must carry out a financial assessment to decide what the person may have to pay towards their care costs.
7. The sum needed to pay for care the Council assessed a resident needs we refer to as the personal budget. Anything that costs no more than the personal budget, i.e. the money the Council offers and any contribution from the person needing care we refer to as 'affordable'.
8. Since the Care Act came into force in April 2015 councils must offer at least one choice which is affordable within the personal budget of the person concerned. This ensures they have a genuine choice.
9. People have the right to choose their care home and if they choose one which is more expensive than the rate the Council will pay, someone must be willing and able to pay the difference. Councils refer to this as a top-up. Normally a third party or relative will pay the top-up.
10. Councils must have a written agreement with the person paying the top-up fee. It cannot leave the arrangement to the relative and the care provider. The top-up agreement must include;
 - The extra amount to be paid;
 - The amount specified for residential care in the person's personal budget;
 - The frequency of payments;
 - Provisions for reviewing the agreement;

- A statement on the consequences of stopping payments;
 - A statement on the impact of any increase in charges the care provider makes;
 - A statement on the effect of any changes in the financial circumstances of the person paying the top-up.
11. The Council remains responsible for care costs if the top-up is not paid. The Council may recover the top-up from anyone subject to a top-up agreement or it can offer an alternative placement which is affordable within the resident's personal budget.
 12. The Council must carry out a risk assessment for the resident before it can arrange an alternative placement. It must consider the need to promote the resident's wellbeing by considering the location of the placement and how near it is to family, or whether the move may be detrimental to the resident's health or wellbeing.
 13. Where there are no affordable placements available councils have a duty to offer the person needing care a place without asking for a top-up payment.
 14. Councils cannot ask someone to pay a top-up unless an assessment of need and risk assessment show the resident can be moved and it has offered an affordable alternative placement.

What happened

15. Mrs X has dementia. She does not have capacity to decide where she should live. Although formerly a resident in the Council's area she moved to a care home out of its area near to Mrs Y while funded under the National Health Service continuing health care fund.
16. In February 2016, the NHS continuing care fund decided at a review attended by the Council Mrs X no longer qualified for funding. Under the Care Act 2015 the cost of her care at £870 per week fell to the Council to fund. Its usual local authority rate did not cover the full cost leaving a shortfall of £323 per week.
17. Where the costs of care are more than the personal budget (including any assessed contribution by the resident) the law does not allow the resident to pay for the shortfall. A third party must pay the top-up. Without assessing Mrs Y's financial contribution, the Council told Mrs Y the shortfall in funding would fall on Mrs Y.
18. At a meeting with the Council in February 2016 Mrs Y asked for the financial assessment forms. The Council asked Mrs Y to enter a top up agreement but she explained she could not afford to pay the top-up fee. Mrs Y told the Council Mrs X would have to move. Mrs Y explained given Mrs X's condition any move needs careful planning because it risked Mrs Y disengaging from the support she receives.
19. As an experienced social worker in this field Mrs Y expected the Council to offer help

locating a home near her within Mrs X's personal budget. Before it could offer a move, it needed to carry out an assessment of Mrs X's needs and her finances. However, Mrs Y says the social worker told her the Council does not help families locate an affordable home that is down to them.

20. In March 2016 Mrs Y found a care home which accepted local authority rates. She believed it would meet Mrs Y's needs but asked the Council to send her a copy of Mrs X's care plan so she could share it with the home. The Council did not send the care plan, visit the home or assess Mrs X's needs and finances in time for the care home to offer a placement.
21. Mrs Y did not have a dedicated social worker until the Council appointed one in May 2016. The social worker visited Mrs X's care home. He noted she now needed a nursing EMI placement. The Council contacted Mrs Y asking her to organise a transfer to the home she had identified in March or another home. The finance team also confirmed it had taken over Mrs X's funding from March 2016. At this point Mrs Y had not received a copy of an assessment of Mrs X's care needs.
22. Before any affordable homes could be considered Mrs Y needed to know what Mrs X's personal budget would be. To decide the budget and what Mrs X may have to pay the Council needed to carry out a financial assessment. Mrs Y asked the Council to assess Mrs X's finances. Although she asked for the forms in February and repeatedly in the following months, the Council sent her a financial assessment form in September 2016. Mrs Y completed and returned the form within a few days.
23. When Mrs Y received an invoice in November 2016 for top-up fees Mrs Y asked the Council to arrange for her mother to be moved to a care home closer to her and at a lesser fee. Mrs Y had not entered an agreement with the Council to pay the top-up fee. Mrs Y says she continued to tell the Council she could not afford to pay top-up fees. In December 2016 with the top-up fees still outstanding the Council advised the care home it should give notice to Mrs X ending her care at that home. The Council also told Mrs Y she should look at alternative homes. Given the distance the Council said it could not recommend placements. The Council had not completed the financial assessment or offered an affordable choice to Mrs X.
24. In February 2017 the Council completed the financial assessment and set out the contribution Mrs X needed to pay towards her care.
25. Mrs Y says she did not receive an invoice for Mrs X's contribution from the Council until 27 April 2017. The invoice said the costs now came to over £3000. Mrs Y paid £1000 immediately and asked for time to pay off the rest. The Council said she had three months to clear the debt.
26. Mrs Y complained about the Council's handling of the transition from NHS continuing care funding to council funded care. Mrs Y complained at the time taken to complete a

financial assessment. The Council told her it had no timescales for completing financial assessments. However, the Council agreed to cover all costs up to 1 April 2017. Mrs Y says she has worked in several councils and in each there were timescales for completing all assessments including financial assessments.

27. From then the Council considered Mrs Y responsible for top-up fees. However, in April 2017 the Council had not offered Mrs X (or Mrs Y) a choice of an affordable home having first carried out a risk assessment on whether a move would impact on her health and wellbeing.
28. Mrs Y has not entered a top-up agreement.
29. In September 2017 the Council visited Mrs X and carried out a social care needs assessment.
30. In October 2017 the Council wrote to Mrs Y saying it would look at homes in its area as well as homes near Mrs Y to provide alternatives for Mrs X. It sent a list of homes in the area to Mrs Y.
31. Without a top up agreement costs continued to accumulate. Mrs Y says she received a telephone call from the social worker saying that if she did not move Mrs X within four weeks she would be liable for the top up of £310.00 per week. Mrs Y told the Council she had already made it clear she could not afford to pay the top-up and had never agreed to do so. She asked the Council for help as she worked full time and needed some support in finding a home near to her for Mrs X. Then the social worker told her if she did not pay the top up or move Mrs X the Council would place her in a home in its area.
32. Mrs Y asked the Council to appoint an advocate and complete a mental capacity assessment. Mrs Y says the Council did not appoint an advocate or carry out a mental capacity assessment.
33. Having tried to find a suitable home that charged less than Mrs X's current home Mrs Y found nothing that charged only the Council's rate. The local authority for her area pays a higher rate for care of £560 per week. The Council has not offered three choices of accommodation as the local authority in the area does. In fact, Mrs Y says it has offered no suitable accommodation for Mrs X to choose at all.
34. In Mrs Y's view before it can expect Mrs X to move the Council must offer a suitable affordable choice (i.e. within the personal budget). Before Mrs X moves it should consider if there are any alternative choices (and if not continue to pay the full fee). It must consider if the move would harm Mrs X's health and wellbeing and consider the impact on her support network such as being close to her family.
35. Mrs Y wants the Council to provide support to find an alternative home. A named social worker for Mrs Y. An improvement in financial assessment timescales and to recognise they have not supported or worked with the family as intended under the Care Act.
36. In responding to my enquiries the Council has committed itself to finding a care home

that is affordable and will meet Mrs X's needs removing any worries about payment of top-up fees.

Analysis – was there fault leading to injustice?

37. We issued a focus report in September 2015 on complaints about care costs and support for families. The report quoted from our earlier decisions on care costs and failure to act in line with the Care Act 2014. Families should be given support in deciding where to move a resident when fees can no longer be afforded. I have set out below what should have happened which follows the expectations we set out in our focus report and earlier decisions.

What should have happened?

38. When the Council assumed responsibility for Mrs X's care in February 2016 it should have in a timely fashion:

- Assessed Mrs X's care needs;
- Reviewed whether the care home met those needs;
- Completed a financial assessment showing what if any contribution Mrs X should make to her care costs;
- Shared the financial assessment and care costs with Mrs Y in a timely fashion;
- Offered an affordable home (in or out of its area) within Mrs X's personal budget;
- Assessed whether Mrs X could be moved to an affordable home without harm to her health or wellbeing and the impact on her support from family and if not, then offer to pay the difference in fees;
- Discussed with and invited Mrs Y to enter a top-up agreement;
- Helped Mrs X in transferring from her current home to another.

39. The Council failed to:

- Assess Mrs X's care needs and decide if a move to an affordable home would affect her health or wellbeing;
- Carry out a financial assessment when it assumed responsibility for the care costs thus failing to decide on a personal budget and whether contributions should be made to the care costs in a timely fashion;
- Offer an affordable choice of home to Mrs X and the family out or in its area before telling the family they needed to pay a top-up fee;
- Provide details of the care plan to enable Mrs Y to find an affordable home in her area;

- Offer support to Mrs X and Mrs Y in finding an affordable home;
- Enter a written top-up agreement;
- Complete the correct procedure before telling the care home to end its agreement.

40. In recognising fault in handling the transfer to Council funding the Council:

- Visited Mrs X to review her care;
- Paid the top-up to April 2017;
- Offered to look at care homes in its area to see if an affordable home could be offered.

41. The failures set out in paragraph 39 are not mitigated by the Council's actions set out in paragraph 40 but those actions show the Council recognises fault.

42. Mrs Y paid £1,000 because of concerns the care home may evict Mrs X from the care home on the advice of the Council. However, that did not mean she agreed to pay top-up fees. Without a suitable affordable choice offered by the Council it should not ask the family to pay those fees. It can only do that if a suitable affordable choice is offered and the family or Mrs X elect to continue in the more expensive care home.

43. Even where there is an affordable alternative the Council must assess if it is likely to harm Mrs X's health and wellbeing to move. If the home is further away from Mrs Y the impact on Mrs X must also be considered. The Council cannot simply offer a home in its area without considering if there are suitable homes in Mrs Y's area.

44. The Council delayed completing the financial assessment for a year. It did not carry out a care assessment until September 2017. Therefore, it is at fault because it could not offer the family an affordable choice until it completed those assessments and located a home.

45. The delay, rising costs, demands for payment of the top-up and advising the care home to end its contract in December 2017 led to avoidable distress and alarm. To resolve the complaint Mrs Y has been put to considerable avoidable time and inconvenience.

46. The faults identified in the investigation have resulted in confusion, distress and delay in moving Mrs X to a new home. It may not be possible now to move her if a move would cause distress and disengagement from the services she receives.

[Back to top](#)

Recommended and agreed action

47. To address the injustice arising from the faults identified I recommend and the Council agrees within one month of my decision to:

- Apologise to Mrs Y for the delay and distress caused;
- Repay to Mrs Y the £1,000 she has already paid because it should not have charged her before completing the procedure;
- Review with Mrs Y what homes have places in the area near Mrs Y and agree to assess the likely impact on Mrs X's health and well-being of any move;
- To pay any shortfall in care costs until it has offered an alternative home for the family to consider, and for four weeks thereafter to give the family time to consider whether to accept the new home or not;
- Offer a written agreement with Mrs Y for payment of a top-up fees if it wishes to pursue that;
- Review whether it can offer an affordable alternative and if no affordable alternatives are available to continue paying the difference in care costs;
- Pay Mrs Y £500 in recognition of the avoidable distress, time and inconvenience to which she has been put.

48. Within three months of my final decision I recommend and the Council agrees to:

- Review its procedures for managing the transfer from continuing healthcare funding to local authority funding ensuring financial assessments are carried out as soon as possible by using time targets and reviews;
- Review its policy on looking for payment of any shortfall before it completes the financial assessment and has offered a choice of an alternative affordable home;
- Review how it manages the search for affordable care homes where the transition from continuing health care support renders accommodation too expensive;
- Draft and provides to residents in future a written guide explaining what the Council will do with reference to the Care Act obligations placed on it and where to go to for help.

[Back to top](#)

Final decision

49. I find fault in the Council's management of the transfer from continuing healthcare funding to Council funding, financial assessment and identification and offer of an

affordable care home.

Back to top

Investigator's decision on behalf of the Ombudsman

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