

# Report by the Local Government Ombudsman

## Investigation into a complaint against Dudley Metropolitan Borough Council (reference number: 16 002 186)

**22 March 2017**

## The Ombudsman's role

For 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.

# Investigation into complaint number 16 002 186 against Dudley Metropolitan Borough Council

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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

Ms A – the complainant

Ms C – Ms A's mother

## Report summary

### Adult Social Care – charging

Ms A complains Dudley Metropolitan Borough Council charged her a top-up fee for her mother's (Ms C's) care home placement.

### Finding

Fault found causing injustice and recommendations made.

### Recommendations

To remedy the injustice caused, we recommend the Council:

- apologise to Ms A;
- refund the top-up fees paid to date (£4,628);
- review its procedures; and
- review cases managed within the Trust's mental health services to see if there are others similarly affected.

The Council has accepted our recommendations.

## Introduction

1. Ms A complains Dudley Metropolitan Borough Council (the Council) refused to offer financial assistance towards the top-up fees for her mother's (Ms C's) residential care.

## Legal and administrative background

### The Local Government Act 1974

2. The Ombudsman investigates 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)*)
3. The Ombudsman investigates complaints about councils and certain other bodies. Where an individual, organisation or private company provides services on behalf of a council, the Ombudsman can investigate complaints about the action of these providers. (*Local Government Act 1974, section 25(7)*)
4. The Council's social care services are provided by an agreement with Dudley and Walsall Mental Health Partnership NHS Trust (the Trust). Ms C's care is managed by the Trust's community mental health team for older people (CMHT). The Council is accountable for services provided by the Trust. Any findings of fault in this report are against the Council.
5. The Ombudsman 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*)

### Law and guidance on third party payments for residential care before 1 April 2015

6. The statutory guidance below applies to Ms C's case because she was placed in a care home before 1 April 2015. The law and guidance changed on 1 April 2015 when the Care Act 2014 came into force.
7. The Department of Health's [Charging for Residential Accommodation Guide](#) sets out the circumstances when third party payments (called 'top-ups') can be made. This includes when a resident has chosen to move into a care home that is more expensive than a council would expect to have to pay.
8. Councils are required to set the standard rate for care homes. The standard rate is the full amount it costs a council to provide the accommodation whether directly or under a contract with another provider. (*National Assistance Act 1948, sections 22(2) and 26(2)*)
9. The [Department of Health's Local Authority Circular \(2004\) 20](#) provides guidance on complying with the Choice of Accommodation Directions and Additional Payments Regulations. The Circular says the following.

- Individual residents should not be asked to pay more towards their accommodation because of market inadequacies or commissioning failures. Where an individual has not expressed a preference for more expensive accommodation, but there are not, for whatever reason, sufficient places available at a given time at the council's usual costs to meet the assessed care needs of a supported resident, the council should make a placement in more expensive accommodation. In these circumstances neither the resident nor a third party should be asked to contribute more than the resident would normally be expected to contribute and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees. Only when a resident has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top-up.
- Councils should make it clear to residents and third parties, in writing, the basis on which arrangements are to be made.
- Failure to keep up top-up payments may result in the resident having to move to other accommodation unless, after an assessment of need, it is shown that assessed needs can only be met in the current accommodation. In these circumstances, councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees.
- Individuals and/or those who represent them, need information on the options available to them so they can exercise genuine choice. They should be given fair and balanced information with which to make the best choice of accommodation for them. Councils should explain their rights. Councils should also consider providing material in a range of forms including written leaflets in local community languages.
- The resident will need to demonstrate that the third party is able and willing to pay the top-up.

10. The Circular also explains the following.

- The guidance applies only where a resident explicitly chooses to enter accommodation other than that which the council offers them, and where that preferred accommodation is more expensive than the council would usually expect to pay.
- Councils should not seek resident or third party contributions in cases where the council itself decides to offer someone a place in more expensive accommodation in order to meet assessed needs, or for other reasons. Where there are no placements at the council's usual rate, councils should not leave individuals to make their own arrangements having determined that they need to enter residential accommodation and do not have care and attention otherwise available to them. In these instances, councils should make suitable alternative arrangements and not seek a contribution from the individual other than their contribution as assessed under the National Assistance (Assessment of Resources) Regulations 1992.

Councils must never encourage or otherwise imply that care home providers can or should seek further contributions from individuals in order to meet assessed needs.

### **Guidance on third party payments for residential care since 1 April 2015**

11. Care and Support Statutory Guidance 2014 states a council is responsible for the total cost of a placement, including the top-up. If the person paying the top-up stops paying it, the council would be responsible for the full fee. The Care and Support Statutory Guidance cautions against the third party paying the top-up directly to the care home and recommends the person pays the top-up to the council.
12. Our focus report [Counting the Cost of Care](#) (September 2015) about our experience of handling complaints about care home funding highlighted common problems including poor or no information in writing, lack of choice of placements and councils abdicating responsibility for top-ups. We issued the focus report to remind councils of their legal responsibilities.

### **How we considered this complaint**

13. This report has been produced following the examination of relevant files and documents.
14. The complainant and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.

### **Investigation**

15. The Trust carried out an assessment of Ms C in mid February 2015 when she was in hospital. Her family were asking for residential care for Ms C who has vascular dementia. The Trust agreed to fund residential care and Ms C moved into a care home which her family had chosen in March 2015. The placement cost £408.83 a week. There was a top-up. There is no evidence any alternative placement was made available for Ms C which did not need a top-up or any record the CMHT searched for vacancies at any other care homes.
16. Contact notes say the care co-ordinator discussed top-up fees with Ms A and her sister on 10 February 2015 and 17 March 2015. The care co-ordinator said she explained top-ups were a third party contribution. There was no documented evidence of a discussion about affordability.
17. Internal emails between Ms C's care co-ordinator and the Council's Head of Commissioning in March 2015 say:
  - the care co-ordinator explained to the family that the top-ups were a third party contribution. The family said they had been paying the top-up from Ms C's savings as they thought this was allowed. Their solicitor had told them shortly after they began using Ms C's savings this was not allowed. The daughter said she could only afford £50 a week;

- the care co-ordinator asked if there was going to be a change to current practice so that in future the Council would pay the full cost of a care home placement including any top-up and then bill the third party separately. The care co-ordinator said she thought that would work better because the Council 'would have something written down and signed';
  - the care home refused to accept a lower top-up rate and there was a deficit of £61 a week;
  - the Head of Commissioning said the Council would in future pay for the placement in full and would also pay the £61 shortfall.
18. On 8 April 2015, Ms A's sister called the CMHT and it was noted the family were aware the Council had agreed to pay an extra £61, and the family would pay £50 towards the top-up. Ms A's sister said she had not had anything in writing.
19. On 9 November 2015, Ms A called the CMHT and advised the family could no longer afford the top-up. On 16 November, a new care co-ordinator advised she would do a reassessment of Ms C's social care needs. There was no record of any consideration of affordability.
20. There was an assessment for NHS continuing healthcare at the beginning of December. The outcome was Ms C did not meet the eligibility criteria for continuing healthcare funding. (Continuing healthcare funding is NHS funding to meet all health and social care needs.)
21. The care co-ordinator spoke to the care home manager in December 2015. The latter said she had spoken to Ms A and said social services would not pay the £50 top-up and if the family wanted Ms C to stay in the care home, they had to continue paying. The care co-ordinator spoke to Ms A on the same day, saying the Council would not pay the £50 top-up but would support the family if they wanted to consider another placement.
22. There was a review of Ms C's support plan in May 2016. Ms A was invited to the review meeting but did not attend. The review noted Ms A continued to pay the top-up. The outcome of the review was the care home was meeting Ms C's needs and the placement was to continue. The review form noted '*family paying third party top-up – agreement is with the care home*'. The cost of the placement was £408.83.
23. The Council's response to Ms A's complaint said:
- a social worker from the community mental health team assessed Ms C's needs and the social worker (care co-ordinator) discussed top-up payments with the family in March 2015;
  - the social worker contacted several homes to establish vacancies and cost. Records did not specify which homes were contacted. The funding panel agreed to fund 24 hour care at £408.83;
  - there were still issues about the top-up and the social worker met with Ms C's daughters again to discuss this. The social worker was unsuccessful in negotiating a

lower top-up with the care provider. The Council then agreed to meet part of the top-up (£61) when the family said they could only afford £50;

- in November 2015, the daughter contacted the CMHT's team manager to say she could no longer afford the top-up. The team manager agreed to reallocate the case for a review. The original social worker had left and so it was not possible to establish what information was provided about top-ups;
- the care home had a signed agreement from the family to pay £50 of the top-up. If the family could not continue to pay the £50 top up, the Council would seek an alternative placement which could meet Ms C's needs.

24. Ms A was not happy with the Council's response and complained to us.
25. The Council told us there were no leaflets on top-ups at the time Ms C went into residential care. Leaflets are now available and families sign a form to say they have received and understood the information. The Council also told us the top-up agreement was with the Care Provider but has not disclosed a copy of the agreement.

## Conclusions

26. We consider there was fault in the way the Trust, which acts for the Council, handled Ms C's case because it did not act in line with statutory guidance. There is no evidence any alternative placement was made available for Ms C which did not need a top-up. The Council claimed in its response to Ms A's complaint that the social worker had contacted several care homes to establish vacancies and costs. If the CMHT had provided Ms A with information to enable her to find a care home at the standard rate, we consider this should have been recorded in writing. There is no record of any approaches by the CMHT to any other care homes.
27. People have a right to make informed decisions about care homes. A meaningful choice is not possible if they are not aware of the availability of placements not requiring a top-up. Ms A raised concerns about the affordability of the top-up as soon as she became aware that the top-up could not be paid using Ms C's savings. This suggests that the family would have made a different decision if they had been told about any vacancies at the standard rate at the time a need for a placement was identified.
28. Local Authority Circular (2004) 20 says councils can only charge a top-up "*where a resident explicitly chooses to enter accommodation other than that which the council offers them, and where that preferred accommodation is more expensive than the council would usually expect to pay*". The family did not explicitly choose more expensive accommodation, as the Trust did not offer any accommodation which did not require a top-up. If it had offered such accommodation it should have recorded this. That means it should not have asked Ms A to pay the top-up. That was fault.
29. In addition, there is fault because the Trust did not act in line with statutory guidance as:
  - it cannot provide evidence of information given to the family about top-ups and in any event did not give any information in writing because it had no standard leaflets at the time;

- it never entered into a written top-up agreement with Ms A;
- it did not check on the continued affordability of the top-up or on Ms A's ability and willingness to continue paying it after Ms A raised concerns a second time in November 2015.

### ***Injustice***

30. On the balance of probability, we consider Ms A only agreed a top-up in March 2015 because she wrongly believed Ms C could pay it from her own funds. We conclude this because shortly after Ms C went into care, Ms A contacted the Trust to say she (Ms A) could not afford to pay the top-up and a solicitor had told them Ms C could not pay it from her own funds. Although the Trust then paid part of the top-up, it still left Ms A to pay £50 a week. But for fault by the Trust, Ms A would not have had to pay this. She continued to do so until the end of October 2016 when the Council agreed she could stop paying following our draft recommendations.

### **Decision**

31. The Trust, which acted for the Council, was at fault because it did not give a choice of at least one vacant placement at the standard rate. And it gave no written information about top-up fees, did not enter into a written top-up agreement and did not establish whether the top-up was affordable for Ms A. This caused injustice because Ms A paid a top-up which she should not have had to pay.

### **Recommendations**

32. To remedy the injustice identified in paragraph 30, we recommend the Council, within one month of the date of this report:

- refund the £4,628 top-up payments Ms A has paid to date;
- apologise to Ms A;
- reassess Ms C's needs before making any changes to her care plan including any change of placement.

The Council has accepted the above recommendations.

33. Practices by the Trust, which acts on behalf of the Council, reveal evidence of systemic fault, and potential injustice to others in a similar situation. So we are using our power to make wider recommendations to remedy injustice to others who have not complained.

Within three months of our final report, we recommend the Council:

- review all those who are in Council-funded residential care managed within the Trust's mental health services and who pay top-ups to see if any refunds are due to customers for the same reasons as in this report; and

- review its procedures and ensures that:
  - they are in line with the Care Act 2014;
  - it enters into written top-up agreements with third parties (rather than the agreement being between the care home and the third party); and
  - it considers ending the practice of allowing a third party to pay the top-up directly to the care provider as this is not recommended in current statutory guidance. If the decision is to continue with current practice, the Council should give full reasons.

34. At the end of the three months, the Council should provide us with a written report of the review of its procedures and review of other cases potentially affected.

35. The Council has accepted the recommendations in paragraph 33 and has already begun reviewing cases to see if there are others who are similarly affected. It has also issued a briefing note to staff to remind them to offer at least one placement with no top-up and reviewed its general publicity and leaflets on residential care and top-ups. We welcome this action but have reported on this case to highlight systemic fault and to remind councils of their responsibilities in this area.