

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Hertfordshire County Council
(reference number: 19 000 200)**

7 September 2020

The Ombudsman's role

For more than 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.

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

Mrs X The complainant

Report summary

Adult Social Care - council assessment

Mrs X complains the Council has failed to assess her needs properly, reducing her personal budget to a level which means it no longer meets them.

Finding

Fault found causing injustice and recommendations made.

Recommendations

We recommend the Council:

- within four weeks:
 - writes to Mrs X apologising for the uncertainty caused by its flawed assessment and failure to fully meet her need for help maintaining a habitable home;
 - pays her £650 for the failure to fully meet her need for help maintaining a habitable home;
 - pays her £250 for the time and trouble it has put her to in pursuing her complaint;
- at a date to be agreed with Mrs X, completes a Care Act compliant assessment of her needs, including a decision on her eligibility, and produces a care and support plan which complies with the requirements of the Care and Support Statutory Guidance;
- within eight weeks provides evidence that it has:
 - taken action to ensure all future assessments comply with the requirements of the Care Act;
 - taken action to ensure in future everyone with eligible care needs receives a care and support plan which complies with the requirements of the Care and Support Statutory Guidance;
 - taken action to ensure in future the Council fulfils its duty to meet the need for help maintaining a habitable home;
 - produced a plan for identifying anyone else with an existing eligible need for help maintaining a habitable home which is not being met and correcting this.

The complaint

1. The complainant, whom we refer to as Mrs X, complains the Council has failed to assess her needs properly, reducing her personal budget to a level which means it no longer meets them.

Legal and administrative background

2. We investigate 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), as amended*)
3. The Care and Support (Eligibility Criteria) Regulations 2014 set out the eligibility threshold for adults with care and support needs. The threshold is based on identifying how a person’s needs affect their ability to achieve relevant outcomes, and how this impacts on their wellbeing. To have needs which are eligible for support, the following must apply.
 - The needs must arise from or be related to a physical or mental impairment or illness.
 - Because of the needs, the adult must be unable to achieve two or more of the following outcomes:
 - managing and maintaining nutrition;
 - maintaining personal hygiene;
 - managing toilet needs;
 - being appropriately clothed;
 - being able to make use of the adult’s home safely;
 - maintaining a habitable home environment;
 - developing and maintaining family or other personal relationships;
 - accessing and engaging in work, training, education or volunteering;
 - making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
 - carrying out any caring responsibilities the adult has for a child.
 - Because of not achieving these outcomes, there is likely to be, a significant impact on the adult’s wellbeing.
4. The Care and Support Statutory Guidance says a care and support plan must include:
 - the needs identified by the assessment;
 - whether, and to what extent, the needs meet the eligibility criteria;
 - the needs that the authority is going to meet, and how it intends to do so;
 - for a person needing care, for which of the desired outcomes care and support could be relevant;

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- the personal budget;
 - information and advice on what can be done to reduce the needs in question, and to prevent or delay the development of needs in the future;
 - where needs are being met via a direct payment, the needs to be met via the direct payment and the amount and frequency of the payments.

How we considered this complaint

5. We have produced this report after examining the relevant files and documents, and discussions with Mrs X.
6. We gave Mrs X and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before we completed the report.

What we found

What happened

7. At the time of her complaint, Mrs X lived at home with her husband but he could not care for her. She is cared for in bed and has various medical conditions, including:
 - one which affects her body's ability to regulate its temperature;
 - a psychological disorder characterised by physical symptoms that suggest physical illness or injury; and
 - chronic fatigue syndrome.
8. When the Council assessed Mrs X's needs in April 2015, it found she could not achieve any of the outcomes identified by the Care and Support Statutory Guidance (see paragraph 3 above).
9. Mrs X received a package of care from the Council (£484.54 a week) which provided for:
 - two hours every day to help with toileting, personal care, making lunch and a drink; and
 - 10-hour night sits on Saturdays and Sundays to allow Mr X a full night's sleep.
10. She also received £592.58 a week from the Independent Living Fund (ILF), which the Council replaced when the ILF ended in June 2015, to pay for:
 - 45 hours for a carer to sleep-over five nights a week; and
 - 40 hours to employ personal assistants (PAs).
11. This came to £1,077.12 a week, compared with an indicative personal budget of £767.17.
12. Mrs X's February 2018 review says Mrs X would top-up her personal budget from her own funds to buy more care. The review says her personal budget was meeting her need for help with:
 - maintaining personal dignity as Mrs X cannot wash herself, needs help going to the toilet and help changing clothes and bedding due to sweats;
 - maintaining physical and mental health and emotional wellbeing as Mrs X needs help managing stress;

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- exercising control over day-to-day life;
 - participating in work, education, training or recreation as Mrs X needs help writing and using her computer;
 - staying safe as Mrs X needs someone with her at night;
 - essential household tasks, as Mrs X cannot do them herself;
 - preparing and eating meals; and
 - encouragement with personal care day and night.
13. The review says these needs were unmet.
- Staying safe and being protected from abuse and neglect.
 - Achieving social and economic wellbeing.
 - Maintaining domestic, family and personal relationships.
 - Accessing suitable living accommodation.
 - Contributing to society.
 - Keeping up relationships and participating in the community.
 - Complex health needs.
14. The Council decided to review Mrs X's care package in September 2018 because it was "*disproportionate to need*". As well as visiting Mrs X, the Council consulted a Respiratory Nurse, Mrs X's GP, a Diabetic Specialist Nurse and a Care Co-ordinator from the care agency commissioned by the Council to deliver some of her care. The Council also contacted Mental Health Services which confirmed Mrs X was not receiving services from it. The Council completed a "Care and support review/reassessment" which identified the need to complete a reassessment "*due to change in needs and circumstances*".
15. The assessment says:
- Mrs X did not qualify for a full NHS Continuing Healthcare assessment;
 - her carers grated raw vegetables for her meals but could do this more quickly by using a food processor;
 - Mr X ordered food online;
 - Mrs X has a commode by her bed which she can use independently but uses a pad when unable to do this;
 - a two-hour call in the morning is not proportionate to her needs, given that she is cared for in bed;
 - according to their entries in the log-book carers spent much time providing social support;
 - Mrs X could access other sources of social support (e.g. a local voluntary scheme) but did not want to;
 - the Council would not provide daily support with Mrs X's writing activities as she could access this via its funding for social support. The flexibility of a direct payment meant she could spread this across the week to suit her need;
 - the Council discussed the limits of practical support it could fund for activities such as cleaning, laundry, ironing and other household tasks. It said it was providing care for her, not her husband. The Council says a proportionate

amount of support would be to clean the rooms used by Mrs X (bedroom, bathroom and kitchen).

16. The assessment says Mrs X could rationalise her care as follows:
 - morning - one carer for 45 minutes to: do full body wash; change bed; empty/clean commode; leave ice and ice packs; leave breakfast;
 - lunchtime – one carer for 30 minutes to: provide freshen up; restock ice and ice packs; support to use the commode; empty/clean commode; leave lunch;
 - teatime – one carer for 30 minutes to: provide freshen up; restock ice and ice packs; support to use the commode; empty/clean commode; leave tea;
 - bedtime – one carer for 30 mins to: provide freshen up; restock ice and ice packs; empty/clean commode; change nightwear.
17. It says night-time needs could be met by providing:
 - equipment so Mrs X can administer oxygen herself (confirmed by the Respiratory Nurse);
 - ice and ice packs so Mrs X can manage independently overnight.
18. It says:
 - a direct payment (£80 a week) would meet social needs;
 - Mr & Mrs X to fund help with practical tasks around the home.
19. On 2 October the Council completed a risk assessment over the proposed cut to Mrs X's personal budget.
20. In its letter of 17 October, the Council told Mrs X her direct payment would be £222.80 a week from 20 November.
21. When the Council visited Mrs X on 24 October, one of the care agency's carers was massaging her legs. Mrs X confirmed she wanted to appeal the Council's decision to cut her personal budget. The Council wrote to Mrs X responding to comments she had made on its risk assessment. It said:
 - the NHS Wellbeing Service and Mental Health Team could provide support for stress. She could also consider using a telephone helpline for older people;
 - she should provide up-to-date medical evidence to support the need for carer intervention to prevent skin breakdown;
 - restocking ice and ice packs four times a day would address overheating which could also cause flare ups of urticarial vasculitis (skin lesions caused by inflamed blood vessels);
 - an agency could help with calls if she had difficulties recruiting personal assistants;
 - if she was having problems finding a holistic practitioner she could take this up with her GP;
 - the Respiratory Nurse had recommended an accessible form of oxygen for self-administration;
 - sudden rises in blood pressure were a health need, rather than a social care need which a carer could help with;
 - a medical report from 2008 did not confirm a current need for help managing continence;

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- “*proportionate*” meant using other available resources (e.g. pendant alarm, the Wellbeing Service and the telephone helpline for older people) before providing formal care;
 - it would need evidence of the support carers could provide to address urticarial vasculitis;
 - it had not recommended blended food but using a food processor as less time consuming than grating vegetables by hand;
 - overnight needs could be met by; using a pendant alarm; self-administered oxygen; leaving ice in flasks overnight; a continence review and aids; a medical review to evidence overnight needs; occupational therapy assessment; and a referral to environmental controls;
 - it was offering a direct payment of £80 a week (equivalent to the cost of two days at a day centre) to address the need for social interaction;
 - it had allowed time to clean the areas used for her (i.e. kitchen and bathroom). The Council had not funded practical tasks for some time, so Mr & Mrs X had to fund this out of their joint income;
 - it could not increase her personal budget because of concerns that her carer would not continue to visit if her morning call was only 45 minutes;
 - the Council was not providing funding for carers to massage her, but she could use some the budget for social support to pay for a massage.
22. The Council met Mrs X’s GP on 6 December to get clarity between medical and social care needs. When it wrote to Mrs X on 3 January 2019, it said this did not change its view on how her care needs could be met. It recommended a key safe and a pendant alarm for Mrs X. It offered to refer her to an agency for support in managing her direct payments. It said its recommended care plan was based on four calls a day plus the financial equivalent of two days at a day centre:
- morning - one carer for 45 minutes to: do full body wash, dry and cream; change bed, if necessary; empty/clean commode; leave ice and ice packs; leave breakfast/drinks; ensure oxygen within reach; ensure wearing pendant alarm;
 - lunchtime – one carer for 30 minutes to: provide freshen up; restock ice and ice packs; support to use the commode; empty/clean commode; leave lunch/drinks; ensure oxygen within reach; ensure wearing pendant alarm;
 - teatime – one carer for 30 minutes to: provide freshen up; restock ice and ice packs; support to use the commode; empty/clean commode; leave tea/drinks; ensure oxygen within reach; ensure wearing pendant alarm;
 - bedtime – one carer for 30 mins to: provide freshen up; restock ice and ice packs; empty/clean commode; change nightwear; ensure oxygen within reach; ensure wearing pendant alarm.
23. The Council said:
- four calls a day would meet Mrs X’s need for help with continence;
 - it had discussed her concern about the effect of continence pads on her skin with her GP who said there was no current medical evidence of an allergy. But the GP would offer to refer her for a continence assessment so she could trial pads;

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- it was clear social care was being used to address health needs, but this was not appropriate;
 - Mrs X had no formal diagnosis of urticarial vasculitis. A medical professional had not prescribed applying ice and creams. The Council would no longer fund carers to do this;
 - four calls a day would meet the need to apply cream to pressure areas. The National Institute for Clinical Excellence recommended repositioning at least every six hours, pressure relieving mattresses but not massages for people susceptible to pressure ulcers;
 - there was no social care need linked to migraine (for which Mrs X does not take medication) but she could access the NHS's Wellbeing Service for support in coping with pain;
 - the Respiratory Nurse had recommended providing oxygen in a concentrator which Mrs X could use herself;
 - a pendant alarm would enable Mrs X to call for medical help, if needed;
 - carers could not help with oesophageal bleeds, but a pendant alarm would enable Mrs X to call for medical help;
 - carers could not affect high blood pressure. Mrs X could contact her GP to discuss treatment. The GP had referred Mrs X to the NHS Wellbeing Service to learn techniques to overcome stress;
 - Mrs X could self-administer ice packs to counter night-sweats using ice from an insulated flask;
 - a carer could apply cream to Mrs X's feet four times a day to improve circulation;
 - spasms across the lower chest were a medical need, not a social care need, for which Mrs X should get medical advice.
24. On 6 February the Council responded to Mrs X's appeal. It said:
- there was no evidence of a need for overnight care from a carer;
 - the use of continence aids, a pendant alarm and self-administered oxygen and ice packs would mitigate any risk arising from the reduced direct payments;
 - her direct payments would reduce to £222.80 from 12 February.
25. From 12 February 2019 the Council:
- arranged a care agency to provide a 45-minute call each morning to help with: a full body wash, dry and cream; change the bed, if necessary; empty and clean the commode; leave ice and ice packs; leave breakfast;
 - provided £80 a week to meet social needs;
 - provided a direct payment of £142.80 a week to employ PAs for three thirty-minute calls a day to help with toileting, nutrition and personal care.
26. The Council visited Mrs X to review her care and support plan in May 2019. The care agency said:
- the Council should extend the morning call from 45 mins to one hour, as it often overran because of Mrs X complex needs;
 - Mrs X was losing calf muscle following the reduced call times;

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- the carers did not have enough time to cream Mrs X's legs, but Mrs X confirmed she would not let the carers wash her bottom half;
 - Mrs X spent much time talking to the carers which distracted them from their tasks.
27. Mrs X said she had to talk to the carers as she spends so much time on her own. The Council decided not to increase the length of the morning call as it was satisfied the existing package of care was enough to meet her needs. It wrote to confirm this on 21 June.
28. Mrs X has continued to buy extra help to meet her needs using her savings. But she says these are running out.

Conclusions

29. When reviewing Mrs X's needs in September 2018 the Council identified the need for a reassessment because her needs had changed. That assessment should have complied with the requirements of the Care Act 2014 and the Care and Support (Eligibility Criteria) Regulations 2014 ("the Regulations"). But it did not do so, as the Council failed to determine her eligibility under the Regulations. That was fault by the Council. It leaves some doubt over what Mrs X's eligible needs are and what needs the Council has a duty to meet, which is an injustice.
30. Assessments must address all the outcomes identified in the Regulations (see paragraph 3 above). But the September 2018 assessment fails to do so. That is fault by the Council.
31. The Council also failed to produce a care and support plan for Mrs X which complies with the requirements of the Care and Support Statutory Guidance (see paragraph 4 above).
32. Some of the required information is contained in the Council's "Care and support plan review/reassessment" and the letters it has sent to Mrs X but it has not been consolidated in a care and support plan. Also, there is nothing about the eligibility criteria and no personal budget. That is fault by the Council. Again, this leaves some doubt over whether the Council is meeting all the needs it has a duty to meet.
33. Although the assessment does not say so, it seems likely Mrs X has an eligible need for help maintaining a habitable home as she is cared for in bed and cannot therefore clean the rooms used by or for her, or wash her clothes. It appears the Council's practice is not to meet such needs but tell people they should fund this themselves. But the Council has a duty to meet eligible needs and cannot fulfil that duty by telling someone to pay for support themselves. The Statutory guidance makes it clear that "*there is no hierarchy of needs*" (paragraph 6.114). The Council's failure to meet this need is fault.
34. The Council's faults do not mean it has to reinstate Mrs X's personal budget to the level it was before February 2019. Although the September 2018 assessment was flawed, it does provide some justification for meeting Mrs X's needs with a smaller personal budget. Nevertheless, Mrs X has been caused injustice because of the doubt over the flawed assessment, the failure to meet the need for help with housework, and the time and trouble she has been put to in pursuing her complaint.

Recommended action

35. We recommend the Council:
- within four weeks:
 - writes to Mrs X apologising for the uncertainty caused by its flawed assessment and failure to fully meet her need for help maintaining a habitable home;
 - pays her £650 for the failure to fully meet her need for help maintaining a habitable home;
 - pays her £250 for the time and trouble it has put her to in pursuing her complaint;
 - at a date to be agreed with Mrs X, completes a Care Act compliant assessment of her needs, including a decision on her eligibility, and produces a care and support plan which complies with the requirements of the Care and Support Statutory Guidance;
 - within eight weeks provides evidence that it has:
 - taken action to ensure all future assessments comply with the requirements of the Care Act;
 - taken action to ensure in future everyone with eligible care needs receives a care and support plan which complies with the requirements of the Care and Support Statutory Guidance;
 - taken action to ensure in future the Council fulfils its duty to meet the need for help maintaining a habitable home;
 - produced a plan for identifying anyone else with an existing eligible need for help maintaining a habitable home which is not being met and correcting this.

Decision

36. The Council was at fault because it failed to:
- do a Care Act compliant assessment in September 2018;
 - produce a proper care and support plan;
 - meet Mrs X's eligible need for support maintaining a habitable home.
37. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet, or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)