

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

**Investigation into a complaint against
Lincolnshire County Council
(reference number: 16 003 268)**

30 January 2020

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.

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.

Report summary

Failure to carry out duties under the Care Act

We have written this Further Report because the Council has failed to comply with recommendations made in a report issued on 11 January 2018. The recommendations were to improve its arrangements for collecting top-up fees for residential care to ensure they were in line with statutory guidance. The Council was given three months to respond to the report and provide evidence of compliance. It failed to provide a satisfactory response to our concerns about the collection of third party top up fees. We are therefore issuing a Further Report to highlight the ongoing concerns about the Council's failure to fully acknowledge and remedy its faults.

Finding

Fault causing injustice and recommendations made.

Recommendations

We recommend the Council reviews its procedures to bring them fully in line with the Care Act 2014 and the statutory guidance.

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The complaint

1. We made recommendations in a previous report that the Council brings its payments of top-up fees for care homes in line with the regulations and statutory guidance. We are concerned that the Council has not fully implemented our recommendations.

The Ombudsman's role and powers

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 Council must consider the report and confirm within three months the action it has taken or proposes to take. If the Council does not accept our recommendations, it should consider the report at a full Council meeting and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

How I considered this complaint

4. We produced this report after examining relevant documents.

What we found

Law and guidance

5. The Council's duties and powers are set out in:
 - the Care Act 2014;
 - the Care and Support and Aftercare (Choice of Accommodation) Regulations 2014; and
 - the Care and Support Statutory Guidance 2014 (updated 2017).

Top-up fee

6. The council has a duty to assess adults who have a need for care and support. If the needs assessment identifies eligible needs, the council will provide a support plan which outlines what services are required to meet the needs and a personal budget which calculates the costs of those services. (*Care Act 2014, section 24*)
7. If a person is eligible for council funded care, the council must find them a care home within their personal budget.
8. A person can choose a care home that is more expensive than the amount set out in the personal budget. They will then have to pay a top-up fee which is the difference between the care home fees and the amount set in the personal budget. This top-up fee is normally paid by a third party.

Who is liable for the cost of the placement?

9. The Guidance says the local authority is responsible for the total cost of the placement. This means that if there is a break down in the arrangement of a

‘top-up’, for instance if the person making the ‘top-up’ ceases to make the agreed payments, then the local authority would be liable for the fees until it has either recovered the additional costs it incurs or made alternative arrangements to meet the cared for person’s needs. (*Guidance, annex A, section 28*)

Who are the fees paid to?

10. The Guidance sets out three options for payment of the top-up fee.
 - Treat the top-up fee as part of the cared for person’s income and recovers the cost from the resident. Where a third party pays the top-up fee rather than the cared for person, this is on the assumption that the third party makes the payment to the cared for person.
 - The council agrees with the cared for person, the third party and the care home that the top-up fee is paid directly to the care home. This can only be done by agreement and the Guidance says this is not the recommended approach.
 - The third party pays the top-up fee to the council and the council then pays the full amount to the care home.

Underlying principles of the Guidance

11. The Guidance is clear that councils should deter arrangements for ‘top-up’ fees to be paid directly to the care home and this should only happen by agreement with the third party. The Guidance says: ‘In doing so it should remember that multiple contracts risk confusion and that the local authority may be unable to assure itself that it is meeting its responsibilities under the additional cost provisions in the Care Act. Local authorities must ensure they read the guidance at annex A on the use of ‘top-up’ fees.’
12. The council should also ensure that there is no undue pressure on the person making the top-up payment to increase the level of payment. (*Guidance, annex A section 29*)
13. The Guidance also says that the local authority must ensure the person who pays the top-up fee enters a written agreement with the local authority agreeing to meet the cost. (*Guidance, annex A, section 22*)

Background to the remedy

14. We published a report about the Council in January 2018 and found failings in how it arranged an emergency placement in a care home.
15. The report said, among other things, that there was fault in the Council’s collection of the top-up fee. The Council did not give third parties the option to pay the top-up fee to the Council and said they had to pay this directly to the care home. We said this was in breach of the regulations and Guidance.
16. We recommended that the Council brought its procedures in line with the Care Act by:
 - reviewing its procedures to ensure that people were offered the option to pay the top-up fee directly to the Council;
 - reviewing its top-up fee contract to ensure that people were offered the option to pay the top-up fee directly to the Council; and
 - reviewing existing top-up agreements to bring them in line with the Care Act.

The Council's actions

17. The Council accepted the findings of fault. However, it did not accept our recommendations and instead adopted a modified payment system.
18. Under the Council's modified system, the care home collects both the resident's contribution and the top-up fee, by default.
19. However, the agreement between the care home and the Council says:
 - the care home collects the top-up fee and the resident's contribution on behalf of the Council;
 - the care home is expected to chase third parties one month after the sum is due and then to send them reminders on a fortnightly basis for up to 60 days;
 - the care home can only obtain payment from the Council after 60 days; and
 - the Council can terminate the placement if a debt remains unpaid for 60 days.
20. The Council stated it would review its approach to top-ups in the light of changing circumstances and as part of its review of its residential care contracts in the financial year 2020/21.

The Council's reasoning

21. The Council said:
 - it employs the care home as an agent to collect the fees;
 - the use of agents to carry out the Council's functions is allowed; and
 - it could therefore be argued that its payment arrangements do not depart from the Guidance.
22. The Council said that, even if it was argued that the payment arrangement departed from the Guidance and our recommendations, this was allowed if it had cogent reasons to do so.
23. The Council said it had concerns about the financial, operational and practical impact of changing the payment arrangements. The Council's IT systems were going through a transitional phase and the Council was worried about the risk of processing an increased volume of transactions through its systems. The Council also had concerns about the capacity of its external contractor to cope with the change. It said the contractor had difficulties in recruiting and keeping staff and there was a lack of office space.
24. The Council was also concerned about the financial impact of the change. It said a change in the payment system would increase the risk of debt to the Council.
25. The Council came to this conclusion by comparing the rates of unpaid fees in home care (2.5%) to those for residential care under the existing payment arrangements. The estimated figures related to the collection of the resident's contribution and the top-up fee. Although the collection of the resident's contribution is outside of the scope of this report, I mention the figures as they form part of the Council's argument that it had cogent reasons to depart from the Guidance and our recommendations.
26. The Council applied the rate of 2.5% to residential care and said this would add an additional debt of £634,000.
27. It also said the additional administration cost would be:
 - £100,000 set up cost in the first year; and

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- £301,000 in staffing a year.
28. Therefore, in year 1 the additional cost would be (including the additional debt of £634,000):
- £1,035,000 in the first year; and
 - £935,000 in following years.
29. It said these were 'significant sums which would need to be taken from frontline expenditure and at a time of general financial austerity and uncertainty for the Council.'
30. The Council also said there was a Green Paper on the future of social care which may have an impact on payment arrangements. There seemed to be little point in changing its systems when future change may be on the horizon.

Conclusions

Has the Council complied with our recommendation and the Guidance?

31. We are satisfied the Council's modified payment arrangement makes it clear the contractual relationship exists between the Council and third-party, for the purpose of top-ups. We also agree the Council can employ agents to administer the scheme.
32. However, the modified payment scheme does not consider the individual circumstances of each case, as required by the statutory guidance. Importantly, it does not have regard to the protection in paragraph 29, annex A, of the Guidance which states that third parties should be given the option to pay the top-up fee directly to the Council. This is a fault and overlooks an important protection in the Guidance. It also does not comply with our previous recommendation to bring its arrangements in line with the Guidance.
33. The Council has delegated the responsibility to chase third parties for non-payment of the fees. This is likely to cause confusion with third parties and does not make it clear to whom the debt is owed, one of the reasons the Guidance discourages payments to the care home.
34. The payment agreement only permits the care home to obtain payment from the Council after 60 days of non-payment from the third party or resident and requires the provider to produce evidence of the steps it has taken to recover the debt. This creates a risk that care homes may exert undue pressure on third parties and residents to make payments. This goes against the Guidance, which was designed to avoid situations such as this.
35. It also raises the possibility of the termination of the placement after 60 days even though the Council has not been involved in the debt collection.
36. Therefore, we find the Council's proposed modified payment arrangement does not adhere to the statutory guidance. On that basis, we do not consider it has responded satisfactorily to our previous recommendations.

Are the reasons to depart from the Guidance cogent?

37. Lack of office space, excessive costs, poor IT systems and weakness in an outsourced contractor are not acceptable reasons for departing from the Guidance. The fact that the Council is concerned that its own internal and externalised administration cannot support a system that complies with the Guidance is a cause for further concern, rather than a legitimate reason to deviate from the public protections that the law and Guidance seek to create.

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38. The Council's financial argument and particularly the increase in bad debts of £634,000 is also flawed for several reasons.
39. There is no explanation why the rate of repayment and debt for residential care would be different if the fees were paid to the Council rather than to the care home. The Council has based its estimates of non-payment for residential care on the current rate of non-payment rate for home care (2.5%). There is no explanation why that rate would apply.
40. The Council also does not explain why this 2.5% rate would be an 'additional' debt as there is no comparison with the current rate of bad debt. The Council does not say what the current figure of unpaid top-up fees or resident contributions is, presumably because the care homes have those figures. It appears to be working on the assumption that the current rate is 0% which is unlikely to be correct.
41. But most importantly, the payment agreement should not make any difference to the Council's level of debt. The Council is always responsible for any bad debt that results from non-payment of the top-up fee or the contribution and the collection arrangement is irrelevant to this issue.
42. The Council's argument that it should not make changes in anticipation of the government's Green Paper is not a good reason to depart from the Guidance. The Council must follow the current regulations and guidance, not speculative future arrangements which may or may not happen.
43. The Council has not suggested that there are any special circumstances which relate to that authority, or that as one of a select number of authorities, which justifies a different approach. It has not identified a pressing or unusual circumstance justifying departure at this moment in time from statutory guidance. The reason given by Lincolnshire is entirely general and applies to all or almost all local authorities across the country. In reality all Lincolnshire has shown is why it wishes the guidance was different.
44. We are therefore of the view that the Council does not have good reasons to deviate from the Guidance.

Recommended action

45. The Council should make the necessary arrangements to ensure full compliance with the recommendations set out in our investigation report of January 2018 and provide evidence of this within three months of the date of this report.
46. The Council should lay the original report and this further report before the Authority. If it is minded not to comply with our recommendations, then this report must be considered by full Council in accordance with Section 31A(1A) of the Local Government Act 1974.