

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

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

29 November 2019

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

Ms A The complainant

Ms C Her mother

Report summary

Adult social care - charging

We are issuing this further report because the Council has not complied with the recommendations in our 22 March 2017 investigation report. The recommendations were to remedy injustice caused by fault. We gave the Council three months to respond to the report and to show it had complied with our recommendations. It has refused to comply fully and so this report highlights our concerns about the Council's failure to comply and calls upon the Council to do so now.

Finding

Fault causing injustice and recommendations made.

Recommendations

To remedy the injustice and prevent recurrence, the Council should ensure full compliance with the recommendations set out in the investigation report of 22 March 2017 and provide evidence of this without delay.

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.

Introduction

1. Ms A complained about the Council charging her a top-up fee for her mother's care home. When we refer to a top-up fee in this report and in our investigation report of 22 March 2017, we mean a payment by a third party which is an additional cost beyond the sum which a council agrees to pay to meet a person's assessed care needs. (There are other types of third party payments which may also be called top-ups, but we are not concerned with those here.)
2. We investigated Ms A's complaint and found fault. We issued a report on 22 March 2017 explaining our findings and recommending action to remedy the injustice to Ms A and others similarly affected. We also recommended the Council took action to prevent recurrence in future cases.
3. Our recommendations for Ms A's personal injustice were an apology and a refund of the top-up fee. We also recommended the Council review other cases and provide those in the same position as Ms A with a similar remedy. The Council accepted these recommendations, identified 13 other cases where there was no top-up agreement and one case where a choice of placement may not have been offered. We are satisfied with the Council's response in relation to Ms A and others. We also made procedural recommendations to minimise the chance of recurrence in future. A full copy of the investigation report and findings can be found [here](#).
4. We informed the Council that under Section 31(2) of the 1974 Act, our report must be laid before the authority. We asked the Council to consider the report at either full Council, Cabinet or another Committee with delegated authority and tell us, within three months of receiving it, the action it had taken or proposed to take.

Legal and administrative background

5. 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 recommend a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
6. The Council was required to consider our report and confirm within three months the action it had taken or proposed to take. (*Local Government Act 1974, section 31(2), as amended*)
7. If we did not receive a response within the agreed time, or if we were not satisfied with the action the Council had taken or proposed to take, we issue a further report. (*Local Government Act 1974, section 31(2A)*)
8. Paragraph 8.33 of Care and Support Statutory Guidance says:

“where all parties are agreed, it [the local authority] may choose to allow the person to pay the provider directly for the top-up...in doing so it [the local authority] should remember that multiple contracts risk confusion and that the local authority may be unable to assure itself that it is meeting the additional cost provisions in the Care Act”.

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9. Paragraph 29 of Annex A of Care and Support Statutory Guidance says:

“In terms of securing the funds needed to meet the total cost of the care (including the ‘top-up’ element) a local authority has three options [.....]. In choosing which option to take it will need to consider the individual circumstances of the case, and should be able to assure itself of the security of the arrangements and that there is no undue pressure on the person making the ‘top-up’ payment to increase the level of payment. Whichever option it chooses, it remains responsible for the total amount. The three options are:

- treat the ‘top-up’ payment as part of the person’s income and therefore recover the costs from the person concerned through the financial assessment (where the ‘top-up’ payments are being made by a third party rather than the cared for person, this is on the assumption that the third party makes the payment to the person with care needs);*
- agree with the person, the third party paying the ‘top-up’ (if this is not the cared for person) and the provider that payment for the ‘top-up’ element can be made directly to the provider with the local authority paying the remainder. However, as stated earlier, this is not recommended;*
- the person making the ‘top-up’ payments pays the ‘top-up’ amount to the local authority. The local authority then pays the full amount to the provider.”*

How we considered this complaint

10. We produced this further report after giving the Council the opportunity to provide evidence to demonstrate it had complied with the recommendations made in the investigation report.
11. We gave the complainant and the Council a confidential draft of this report and invited them to comment. We took their comments into account before finalising the report.

Investigation

12. The Council placed Ms C in a care home which was above the rate it expected to pay for her care. Our investigation found fault in the way the Council dealt with the financial side of Ms C’s placement. In summary, this was:
- it did not offer an alternative placement for Ms C which did not need a top-up, or it could not evidence in the records that it had done so;
 - the family were not given a choice of an affordable placement. Ms A raised concerns about affording the top-up as soon as she became aware she could not use her mother’s savings to pay it. This suggests the family would have made a different decision if they had been told about any vacancies without top-ups at the time a placement was needed;
 - it gave no information to the family about top-ups;
 - it did not enter into a written top-up agreement with Ms A;
 - it did not check on the affordability of the top-up with Ms A and ignored her concerns about affordability in November 2015.

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13. Our recommendations seek to put the complainant back in the position they would have been in if there had been no fault. To remedy the injustice to Ms A, our investigation report recommended the Council apologise and refund her the top-up payments she should not have paid.
 14. We also recommended that, within three months of the date of the investigation report, the Council should review its procedures, ensure they complied with the Care Act 2014 and:
 - ensure it enters into written top-up agreements with third parties (rather than the agreement being between the care provider and the third party); and
 - considers ending the practice of allowing a 'net payment' approach as this is not recommended in current statutory guidance. (Net payments are where the third party pays top-ups to the care provider directly with the council paying the remainder of the fee to the provider; the alternative approach is for the council to pay the gross or total cost of the placement including the top-up to the provider and then to collect the top-up directly from the third party.) If the decision was to continue the current practice, the Council should give full reasons.
 15. We gave the Council three months to consider the investigation report and respond. The Strategic Director prepared a briefing paper to cabinet. This noted officers were:
 - reviewing how the Council dealt with top-ups. There would be staff training and an information pack about care home finances issued to clients; and
 - instructing social care teams to offer at least one care home with no top-up.
 16. The briefing paper identified significant financial risks and costs to the Council of assuming responsibility for gross payments: administrative costs, staffing costs and a rise in bad debt. Also, if the net payment approach was to continue then we required a full explanation as the statutory guidance did not recommend it. The cabinet delegated its authority to the Strategic Director to respond.
 17. The Strategic Director confirmed to us the Council had:
 - identified 13 other cases where there was a top-up. Of those 13, one case was possibly not offered an alternative and may be due a refund. If no choice of home was offered, the Council would refund the top-up;
 - revised its assessment and support plan forms to include a personal budget;
 - considered ending net payments and noted other authorities continued with this approach. It would also continue because it did not have the budget resources to underwrite the risk of gross payments;
 - revisited its contracts with care homes and there was now 'an explicit reference to the requirement of providers to work with the Council regarding the agreement and ongoing management of third party top-ups.'
 18. We were not satisfied with the Council's actions and wrote to the Chief Executive explaining our concerns about the Council's reasons for continuing with net payments. We noted Regulation 5 of the Care and Support and Aftercare (Choice of Accommodation) Regulations 2014 requires a council to enter into a written agreement with a third party if the council is satisfied they are able to pay the 'additional costs' (the top-up). By requiring the top-up payer to contract with a care home direct we considered the Council was failing to

comply with Regulation 5. We therefore needed to be satisfied the Council would in future issue top-up agreements with third parties rather than leaving the written agreement to care providers. We also pointed to case law which explained the effect of Care and Support Statutory Guidance: that it was not open for the Council to adopt an approach which went directly against this and lesser departures would only be acceptable if there were good reasons. We considered one of the reasons given by the Council for continuing with net payments was irrelevant (other councils do it), and the other reason (an increased financial burden) was a natural consequence of the framework envisaged by Parliament.

19. The Council's current position is:
- a) Where the Choice of Accommodation Regulations apply, it accepts there should be an agreement between the third party and the Council. It had amended its standard contract with providers to reflect this. It had also contacted all care homes and asked them to identify which council-funded residents had top-ups and was taking every effort to ensure there was a top-up agreement between it and existing top-up payers. The Council's new standard contract applied to all new placements with a top-up. It intended to ensure all third parties had written agreements with the Council no later than January 2019
 - b) There is no requirement for councils to make gross payments to care homes because the Care and Support Statutory Guidance gives options for how top-ups can be collected and one of those options is to make net payments. The Council has a right to exercise its discretion. Paragraph 29, Annex A of Care and Support Statutory Guidance says *a council* has three options to secure the top-up cost, it does not say the *third party* has these options. The paragraph does not say which option is preferred. The Council did not agree that it had to give the third party a choice of who to pay. Even if the third party had a choice, a council could still have regard to its resources
 - c) Ending the practice of allowing the third party to pay the care provider directly would present a significant cost to the Council in terms of extra staffing
 - d) Most other councils in the West Midlands continued to pay net fees.

Conclusions

20. We are pleased the Council now recognises it has contractual liability for top-up fees and we are satisfied the Council's action in 19(a) addresses one of our investigation report's recommendations: to ensure there is a written top-up agreement between the Council and the third party.
21. We do not dispute the Council's point in 19(b), that the statutory guidance specifies net payments as a potential option. But Paragraph 29 of Annex A, Care and Support Statutory Guidance says councils must consider the circumstances of each case individually and that top-up fees can only be paid directly to a care home with the agreement of the third party. This means, in our view, that the Council must discuss and agree with each third party who the third party would like to pay – either the Council or the provider. We do not agree with the Council's view that it does not need to give the third party the option to pay the top-up to the Council. The Council's system, as it has been described to us, is that third parties must pay the top-up directly to the provider.

We do not see how a council could be acting in accordance with the guidance if, as is the case here, it imposes a uniform arrangement in all cases. The Council has not evidenced its net payment system considers individual cases. This means the net payment system as it is currently operates in Dudley is not in line with Paragraph 29 of Annex A.

22. One of our investigation report's recommendations was for the Council to review its system and if deciding to continue with the current net payment arrangements, to give us full reasons. We consider the Council has still failed to comply with the second part of that recommendation. The reasons given for continuing with net payments are irrelevant (other councils in the area do the same) or a concern about the natural consequence of the statutory scheme (increased administrative costs). And we have explained in the previous paragraph why we consider the Council's net payment approach does not comply with statutory guidance. Consequently, we are not satisfied the Council has complied with our recommendation for full reasons for continuing with an approach which may be legally permissible but is strongly discouraged by statutory guidance. We expect any explanation by the Council to include a proper assessment of why the other options set out in the statutory guidance (see paragraph nine) would not be suitable.

Final decision

23. We completed an investigation into Ms A's complaint and issued a report explaining our findings and the resulting injustice. Recommendations were made to prevent future injustice to others. We are not satisfied with the Council's proposed actions and so have issued this further report.

Recommendations

24. The Council should make the necessary arrangements to ensure full compliance with the recommendations set out in our investigation report of 22 March 2017 and provide evidence of this without delay.
25. 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.