

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

**Investigation into a complaint about
Birmingham City Council
(reference number: 21 003 197)**

2 September 2022

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
Mrs Y	The complainant's mother

Report summary

Adult social care

Mrs X complained the Council failed to properly explain or advise her about the need for top up fees for her mother, Mrs Y's care home, and has wrongly required her to pay these fees since her mother moved to the care home in 2007. Mrs X says this has placed her family under unnecessary financial strain for many years.

Finding

Fault causing injustice and recommendations made.

Recommendations

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*)

To remedy the injustice caused we recommend the Council:

- apologise to Mrs X and pay her £250 to recognise the distress, time and trouble she has experienced;
- refund Mrs X the top up fees she has paid since Mrs Y returned to Care Home 1 in March 2011;
- provide reminders/training to relevant staff of the importance of keeping clear records. The Council must be able to show it has offered at least one available and suitable care home. The Council should document why a care home is suitable for the individual, any challenge to what is suitable, and the outcome of that challenge.
- provide reminders/training to ensure relevant staff correctly consider and apply the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 and the Council's complaints procedure when responding to complaints.

The complaint

1. Mrs X complained the Council failed to properly explain or advise her about the need for top up fees for her mother, Mrs Y's care home, and has wrongly required her to pay these fees since her mother moved to the care home in 2007. Mrs X says this has placed her family under unnecessary financial strain for many years.

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*)

How we considered this complaint

3. We produced this report after examining relevant documents and speaking to the complainant.
4. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

Charging for residential care

5. The care and support planning process will identify how best to meet a person's needs. As part of that process, the council must give the person a clear explanation of how it has assessed their ability to pay for their care; and the amount of any contribution the person must pay.
6. Where a council is meeting needs by arranging a care home, it must ensure a person has a genuine choice of accommodation. The council should give the person clear and balanced information to make the best choice. It must ensure there is at least one accommodation option available that is affordable and within the council's 'usual cost'. If no accommodation is available within the usual cost the council must arrange care in a more expensive setting. In such circumstances, the council must not ask for the payment of a 'top up' fee.
7. A person can choose accommodation that is more expensive than the council would usually pay if a third party is willing to pay the additional cost - a top up fee. But if a person is placed in more expensive accommodation solely because the council has failed to arrange accommodation at the anticipated cost, then a top up fee will not be payable.
8. In such circumstances, the council needs to ensure the person paying the top up enters a written agreement with the council and can meet the extra costs for the likely duration of the agreement.
9. The council must provide the third party with enough information and advice to support them to understand the terms of the proposed written agreement before entering into it.

What happened here

10. In 2007 Mrs Y was discharged from hospital to a nursing home, Care Home 1. Mrs X says the Council chose and arranged the placement at Care Home 1 and that she was required to pay a top up fee. She says the Council did not give her any information about top up fees or why she was required to pay one. Mrs X assumed that all care home placements involved a top up fee. The Council does not have any records of the arrangements for this placement in 2007.
11. Mrs Y was admitted to hospital in 2011 and Mrs X initially did not want Mrs Y to return to Care Home 1 when she was discharged. Mrs X found an alternative care home but had been told this home would charge a top up fee. The Council also found several alternative care homes which would have required a top up fee from Mrs X. These homes were not able to offer Mrs Y a placement. There is no record of what information or explanation the Council gave Mrs X about the top up fees, but the notes do record Mrs X was not happy about paying a top up fee.
12. As Mrs X could not find a suitable alternative care home, it was agreed that Mrs Y would return to Care Home 1. The Council has provided a copy of the care home placement agreement and third party funding agreement. This states it should be completed where a third party has agreed to pay a weekly top up amount because the home chosen has a fee which is greater than the Council would usually expect to pay. It specifies a top up of £50 a week. While the agreement provided is signed by the Council, it is not signed by either Care Home 1 or Mrs X.
13. Mrs X says she repeatedly questioned the need for the top up fee and what it related to. She says the Council did not consider whether she could afford to pay the top up fee and her concerns were not recorded.
14. The Council's records show that Mrs X told the Council at a review meeting in July 2019 that she was finding it difficult to pay the top up fee. The notes state they discussed looking at alternative nursing homes and trying to negotiate a lower top up fee. Mrs X did not want Mrs Y to move to another home.
15. Mrs X contacted the Council again the following month as she had completed a financial assessment form as part of the reassessment of Mrs Y's contribution towards the cost of her care. The form referred to family or friends paying a top up fee because Mrs Y had chosen more expensive accommodation than the Council was able to pay for. This prompted Mrs X to research top up fees and to question why they were not offered a home where a top up fee was not needed. She felt the Council had not offered her the correct support at a sad and stressful time and asked the Council to look into this.
16. In subsequent discussions with the Council Mrs X reiterated the Council had placed Mrs Y at Care Home 1 without informing her about top up fees and without offering the choice of a home without a top up fee. Mrs X also said she had learnt that other individuals with placements funded by the Council did not have to pay top up fees and she asked for the same parity for Mrs Y. An officer informed Mrs X that there were no records of discussions about Mrs Y's placement in 2007 as the file had been destroyed. But they said a social worker would have told Mrs X about top up fees at the time of the placement and that she would have had a choice of placements, as this was the Council's policy. The Council suggested looking for an alternative care home that does not charge a top up fee.
17. The Council also contacted Care Home 1 to explain Mrs X was not able to afford the top up and to ask whether the charges could be disregarded.

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18. Mrs X had accrued arrears of top up fees of £2,298. Care Home 1 offered to waive future top up fees if Mrs X cleared these arrears. Mrs X was unhappy she was expected to pay the arrears. She said she had stopped paying the top up fees when she complained to Care Home 1 about them in September 2019. She asserted that had the care home dealt with her queries promptly these arrears would not have accrued.
 19. In June 2020 Mrs X made a formal complaint to the Council. She complained the Council had arranged the placement at Care Home 1 in 2007 and had not given her any choice of alternative care homes. Mrs X complained she was led to believe all nursing homes had top up fees which had to be paid by a third party. But her mother-in-law had now moved to Care Home 1 and does not pay a top up fee. She had looked at moving Mrs Y to another care home but did not consider this the right thing to do as Mrs Y had been at Care Home 1 a long time and was settled. Mrs X asked the Council to investigate whether she should have had to pay top up fees for all this time.
 20. The Council responded to Mrs X's complaint in February 2021. It apologised for the delay in responding. The Council referred to the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 which specified a time limit for making complaints. Although Mrs X complained she had been charged a top up fee since 2007, the Council would only consider events over a 12 month period. The Council noted the top up fee arrangement stopped on 1 May 2020 and advised it would consider the period 1 May 2019 to 30 May 2020.
 21. It calculated that during this period Mrs X would have been charged top up fees of £5,200. As Mrs X had not paid all the fees, the Council offered to pay the arrears of £2,298 directly to Care Home 1 and to reimburse Mrs X the balance of £2,902. It also offered to pay Mrs X £250 for her time and trouble.
 22. Mrs X was not satisfied by the Council's response and asked for her complaint to be reviewed. The Council's response confirmed it had checked with Care Home 1 and the outstanding balance in relation to top up fees had been waived from October 2019.
 23. The Council also confirmed it carried out financial assessments to establish whether service users were required to fund or contribute towards their placement. It stated Mrs Y was not a self-funder and that the top up payment was a private arrangement between the care home and the family. As such the Council was not required to carry out a financial assessment for Mrs X.
 24. Again, the Council only considered the 12 month period starting 1 May 2019. As Care Home 1 had waived the arrears, the Council recalculated the top up fees for the period 1 May 2019 to 30 September 2019 and offered to reimburse Mrs X £2,300. It would also reimburse a payment of £1,500 Mrs X had made and again offered £250 for her time and trouble.
 25. Mrs X maintains the Council was wrong to require her to pay a top up fee from 2007 and has asked us to investigate her concerns.
 26. In response to our enquiries the Council states its records in 2007 were in paper format rather than electronic. Its records are brief and it is not able to confirm what discussions took place about Mrs Y's placement. Its records from 2011 are electronic, and the Council states they show Mrs Y's family was supported to find an alternative placement and that it was the family's request she return to Care Home 1.

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27. The Council has also confirmed its offer to Mrs X totalling £4,050 still stands.

Conclusions

28. We are not able to establish what happened when Mrs Y moved to Care Home 1 in 2007. There are no records made at the time of any discussions about how the care home was chosen or how it would be funded. This is not surprising given the passage of time but means we would not be able to reach a sound, evidence-based decision. We will not therefore consider the events of 2007 any further.
29. There are however more detailed records about Mrs Y's placement at Care Home 1 in 2011. It is clear Mrs X did not initially want Mrs Y to return to Care Home 1 when she was discharged from hospital in 2011. Both Mrs X and the Council found alternative care homes, which the Council then contacted about a placement for Mrs Y. These care homes all had top up fees and either did not have availability or could not meet Mrs Y's needs.
30. According to the Council's notes, an officer informed Mrs X of vacancies at two other care homes, which Mrs X declined as they were too far away. There is no indication in the records provided whether these care homes charged a top up fee or whether they would be able to meet Mrs Y's needs.
31. The Council's records show that when Mrs Y was due to be discharged the only interim care bed available was at Care Home 1. The notes state the only other bed was at one of the care homes Mrs X had declined due to their location. The notes go on to say the Council would offer Mrs X this placement although it considered it likely she would decline. There is no record the Council discussed an interim placement at this care home with Mrs X before agreeing a placement at Care Home 1.
32. Nor are there any records of the Council discussing top up fees with Mrs X in 2011. The failure to provide sufficient information about top up fees to enable Mrs X to make an informed choice about placements for her mother is fault. In the absence of an available care home placement which was within the Council's usual cost and could meet her needs, the Council should not have asked Mrs X to pay a top up fee. Requiring her to do so is fault.
33. It is of concern that the Council considers the top up fee was a private matter between Care Home 1 and Mrs X and that there was no need for it to carry out a financial assessment. This is not the case. Legislation and government guidance, both before and since the implementation of the Care Act 2014 are clear that the council must be satisfied the third party is able and willing to pay the additional cost of any preferred accommodation for the likely duration of the placement. And that the third party must enter into a written agreement with the council to pay the additional cost.
34. The Council's Care Home Placement Agreement and Third Party Funding Agreement states it is a three way agreement between the Council, care home provider and the contributor. It can be terminated by either the provider or the Council and states that should the contributor be unable to pay the top up they should contact the Council. It is therefore disingenuous of the Council to refer to the top up fee as a private matter between the care home and Mrs X, when clearly it is not.
35. There is no evidence of any consideration as whether Mrs X could afford to pay the top up fee either in the short term or for the duration of the arrangement. This

is fault, as is the failure to ensure there was a signed written agreement in respect of the top up fees. Neither Mrs X nor Care Home 1 have signed the Council's care home placement agreement or third party funding agreement.

36. In 2019 we found fault with the Council's practice of treating third party top up fees as a private matter between the care home and the third party. In that case we made recommendations that the Council review its third party top up fee arrangements to ensure all top up agreements were compliant with statutory guidance.
37. Since our decision in 2019 the Council has drafted new guidance for its staff and reviewed the information available to care providers and the public. It has not yet implemented these changes but states it will do so imminently. We have not therefore made any recommendations about this issue in this report.
38. We also consider there to be fault in the way the Council has dealt with Mrs X's complaint. The Council claims the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 limit its investigation to a 12 month period. This is not an accurate reflection of the provisions of these regulations. Regulation 12 states a complaint must be made no later than 12 months after either:
- the date on which the matter complained of occurred; or
 - if later, the date on which the matter complained of came to the complainant's notice.
39. In addition, the regulation states the time limit does not apply where the complainant has good reason for not making a complaint within the time limit and that despite the delay, it is still possible to investigate the complaint effectively and fairly.
40. Mrs X complained in 2019 that she had only just become aware that not every care home placement required a top up fee. She then made a formal complaint in 2020, less than 12 months later. The Council's response to Mrs X's complaint does not suggest she was aware of the circumstances in which top up fees could be charged before 2019, or question whether she had good reason not to complain sooner. Nor does it consider whether it was, in any event, still possible to investigate the complaint.
41. We consider the Council's decision to limit Mrs X's complaint to the period 1 May 2019 to 30 May 2020 was flawed. The time taken to investigate Mrs X's complaint is also unacceptable and is fault. The Council's complaints procedure states it will respond to complaints at stage 1 of the process within 20 working days. In this instance the Council took eight months to respond.

Recommendations

42. To remedy the injustice caused we recommend the Council:
- apologise to Mrs X and pay her £250 to recognise the distress, time and trouble she has experienced;
 - refund Mrs X the top up fees she has paid since Mrs Y returned to Care Home 1 in March 2011;
 - provide reminders/training to relevant staff of the importance of keeping clear records. The Council must be able to show it has offered at least one available and suitable care home. The Council should document why a care home is

suitable for the individual, any challenge to what is suitable, and the outcome of that challenge.

- provide reminders/training to ensure relevant staff correctly consider and apply the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 and the Council's complaints procedure when responding to complaints.

43. 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*)

Decision

44. The Council's failure to provide sufficient information about top up fees to enable Mrs X to make an informed choice about placements for her mother is fault. Requiring Mrs X to pay a top up fee when the Council could not identify an available care home placement within Mrs Y's personal budget that could meet her needs is also fault. These faults have caused Mrs X an injustice.