

Report by the Local Government and Social Care Ombudsman

**Investigation into a complaint against
London Borough of Hackney
(reference number: 16 003 210)**

20 July 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.

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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

Mrs X: the complainant

Mrs Y: the complainant's late mother

Report summary

Subject

Adult social care

Mrs X complains London Borough of Hackney refused to fund her late mother Mrs Y's residential care.

Finding

Fault causing injustice and recommendations made.

Recommendations

To remedy the injustice, we recommend the Council settles the invoice with the care home based on its assessed weekly contribution between 26 November 2014 and 20 October 2015 and reimburses Mrs X's reasonable legal costs, subject to evidence of payment. The Council accepts our recommendations.

Introduction

1. Mrs X complains about London Borough of Hackney's (the Council's) refusal to fund her late mother Mrs Y's residential care from 28 September 2014. She says the Council should have reassessed her mother's needs as she had been seeking an assessment before her mother went into the care home.

Legal and administrative background

The Ombudsman's role

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*)

Relevant law and guidance

3. We have referred to law and statutory guidance in force before and after April 2015. This is because some of the events of this complaint happened before the Care Act 2014 came into force in April 2015 and others happened later.

The law before 31 March 2015

4. An assessment of need is the gateway to receiving social care services. A council must carry out an assessment where it appears an adult may be in need of community care services. (*NHS and Community Care Act 1990, section 47*)
5. Statutory guidance explains a council should review an assessment at least yearly or on request or where there has been a change in circumstances. (*Prioritising Need in the Context of Putting People First, paragraph 144*)
6. Councils have a duty to arrange residential care for people over 18 where three conditions are met.
 - A person must need care and attention.
 - The need for care and attention must be because of age, disability, or illness.
 - The care and attention must not be available otherwise than by providing accommodation with care. (*National Assistance Act 1948, section 21*)
7. The authority responsible for providing residential care is the one in which the person is ordinarily resident. (*National Assistance Act 1948, section 24(1)*)
8. There is no definition of "ordinary residence" in legislation. Therefore, the term should be given its ordinary and natural meaning subject to any interpretation by the courts. (*Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England (October 2013)*)

9. Where two or more local authorities fall into dispute over a person's ordinary residence, and that dispute cannot be resolved locally, the authorities may request a determination from the Secretary of State for Health. During the dispute, providing services should never be delayed because of confusion about which authority is responsible. Disputes should be referred to the Secretary of State within four months. The local authority which should provide services until the dispute is resolved, is to be determined in line with directions issued by the Secretary of State.
- If the person is already receiving services, the local authority providing them should continue to do so.
 - If the person is not receiving services, the local authorities in dispute may agree which of them will provide services until the resolution of the dispute.
 - If the local authorities in dispute cannot agree, the local authority in which the person is living must provide the services.

If the person is not living anywhere, the local authority in whose area the person is physically present (the "local authority of the moment") must do so.

(Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England (October 2013))

The law from 1 April 2015

10. A council must carry out an assessment for any adult with an appearance of need for care and support. The assessment must be of the adult's needs and how they impact on their wellbeing and the outcomes they want to achieve. It must also involve the individual and where appropriate their carer or any other person they might want involved. *(Care Act 2014, sections 9 and 10)*
11. An assessment should be carried out over an appropriate and reasonable timescale considering the urgency of needs. *(Care and Support Statutory Guidance 2014, Paragraph 6.24)*
12. The Care Act spells out the duty to meet eligible needs (needs which meet the eligibility criteria). *(Care Act 2014, section 18)*
13. An adult's needs meet the eligibility criteria if:
- they arise from or are related to a physical or mental impairment or illness, and
 - the adult cannot achieve two or more of the outcomes (specified below), and
 - as a result there is, or is likely to be, a significant impact on well-being.

Specified outcomes

- Managing and maintaining nutrition
- Maintaining personal hygiene

- Managing toilet needs
- Being appropriately clothed
- Making use of the home safely
- Maintaining a habitable home environment
- Accessing work, training, education
- Making use of facilities or services in the community
- Carrying out caring responsibilities.

(Care and Support (Eligibility Criteria) Regulations 2014, Regulation 2)

14. The Care Act explains the different ways a council can meet eligible needs by giving examples of services that may be provided:

- Accommodation in a care home or other premises
- Care and support at home
- Counselling and social work
- Information advice and advocacy.

(Care Act 2014, section 8)

15. If a council decides a person is eligible for care, it should prepare a care and support plan which specifies the needs identified in the assessment, says whether and to what extent the needs meet the eligibility criteria and specifies the needs the council is going to meet and how this will be done. The council should give a copy of the care and support plan to the person. *(Care Act 2014, sections 24 and 25)*

16. The care and support plan must set out a personal budget. A personal budget is a statement which specifies the cost to the local authority of meeting eligible needs, the amount a person must contribute and the amount the council must contribute. *(Care Act 2014, section 26)*

17. Statutory Guidance explains a council should review a care and support plan at least every year, on request or in response to a change in circumstances. *(Care and Support Statutory Guidance, Paragraph 13.32)*

18. A council is only required to meet the needs of an adult who is 'ordinarily resident' in their area or is present there but has no settled residence. *(Care Act 2014, section 18(1)(a))*

19. Any dispute about where an adult is ordinarily resident is to be decided by the Secretary of State for Health. *(Care Act 2014, section 40(1))*

20. Regulations require disputes about ordinary residence to be referred to the Secretary of State for Health within four months of the date on which the dispute arose. (*Direction 3, Care and Support (Disputes between Local Authorities) Regulations 2014*)

How we considered this complaint

21. We have produced this report after examining the relevant files and documents and interviews with the complainant and relevant employees of the Council.
22. We gave the complainant and the Council a confidential draft of this report and invited them to comment. We took the comments we received into account before we finalised the report.

Investigation

23. Mrs Y had dementia and was discharged from hospital in early 2014. The Council agreed to fund care in a nursing home for Mrs Y at the time of discharge. However, the family and Mrs Y wanted her to go home and so the Council agreed to fund a package of care to enable her to live at home. Internal notes and emails by social workers in early 2014 indicate the adult social care funding panel was concerned about the high risk to Mrs Y if she went home with a care package. The funding panel eventually agreed to fund home care when Mrs Y's daughter said she would move in with her. Mrs Y's care package was four calls a day with two carers – five hours a day of paid care in total.
24. On 29 September, 2014, the home care agency told the Council Mrs X had called its out of hours' service to cancel visits to Mrs Y as they were going on holiday for two to three weeks. Mrs X said she would notify the agency when she was back.
25. Mrs X did not take her mother on holiday. Instead, she arranged for Mrs Y to go into a care home in a different area for respite care. A Statement of Terms and Conditions dated 28 September 2014, signed by Mrs X and the care home says Mrs Y was to receive temporary respite care. The arrangement was 'private' (as opposed to 'social services') at a weekly fee of £550.
26. Mrs X asserted in later correspondence with the Council that she spoke to council officers by phone before she arranged the respite care. Mrs X claimed she asked for help as she was struggling to care for her mother. She says she made several attempts at contact before 28 September. But there is no evidence in the Council's records to suggest any contact from Mrs X around this time.
27. On 24 October 2014, Mrs X called the duty social worker to say due to Mrs Y's lack of mobility, Mrs X was finding it difficult to manage Mrs Y's transfers (help her to change position). Mrs X asked for a review of Mrs Y's care package as she could not care for her mother throughout the day due to her own health problems. There is no record Mrs X told the duty social worker that Mrs Y was not living in Hackney and was staying in a care home for respite care.

28. Mrs X told us that in October 2014, she was aiming to look after her mother at home again, but she was concerned the Council would need to provide more hours of agency care for Mrs Y in order for this to happen. Mrs X told us that by November 2014, she had decided she could not care for her mother at home after all and she considered Mrs Y had settled in well at the care home.
29. Mrs X and her nephew visited the Council's offices on 26 November asking for financial assistance for residential care. Mrs X said she had placed her mother in a care home for respite care. She said she could not continue caring for her mother and needed at least five months' break. The social worker said it was a private arrangement, that Mrs Y should have been assessed before Mrs X arranged the placement and Mrs Y should return home to be assessed.
30. On 4 December, after discussion with a manager, a social worker and service manager said the family should ask Council C (where the care home was located) to assess Mrs Y.
31. In December 2014 and January 2015, there were emails and correspondence between Council officers and officers in Council C about which authority was responsible for Mrs Y and where she was ordinarily resident. Officers from both councils sought legal advice. Neither council accepted funding responsibility.
32. The Council did not allocate a social worker to carry out a social care assessment. A manager said in an email in February 2015 that Mrs Y's case should be allocated for an assessment.
33. In May 2015, Council C wrote to the Council asking it to carry out a social care assessment of Mrs Y. Council C said it understood the combined effects of Mrs X's own ill health and other caring responsibilities meant the family needed further help with Mrs Y and were reaching crisis point at the time they arranged the care home placement. Council C said that it believed that Mrs Y remained ordinarily resident in Hackney and so Hackney was responsible for funding her care. And Mrs Y's family wanted her to live in Hackney. Council C said it would refer the case to the Secretary of State if the Council did not accept responsibility for Mrs Y. There is no evidence Council C or the Council referred the case to the Secretary of State.
34. In June 2015, a duty officer noted Mrs Y's case was still awaiting allocation and asked a manager to allocate it. A duty officer from Council C contacted the Council on 10 June to say Mrs Y's family wanted her to move back to Hackney and she still had a tenancy in Hackney. The case was allocated to a Hackney social worker at the end of June 2015.
35. The social worker carried out an assessment of Mrs Y's social care needs in August 2015. The outcome was she was eligible for care services. She required total support to:
 - maintain a habitable environment;
 - manage and maintain her nutritional needs;
 - manage toileting;

- dress in appropriate clothing;
 - develop and maintain family and personal relationships;
 - stay safe.
36. The personal budget for Mrs Y was £653. A support plan of August 2015 said Mrs Y required residential care in a care home specialising in dementia care. The support plan recorded comments from Mrs X including:
- the family did not intend Mrs Y stayed out of area.
 - they knew the care home's owner and that was why the family placed her there for respite care as Mrs X was at breaking point.
37. In October 2015, the Council agreed to fund Mrs Y's placement from 21 October 2015. Mrs Y's contribution was £126.30 and the Council's £423.70.
38. In November 2015, Mrs X instructed a solicitor. The solicitor asked the Council to pay the outstanding debt to the care home as Mrs Y was ordinarily resident in Hackney.
39. In February 2016, the Council wrote to Mrs X's solicitor saying:
- the family turned down a residential care placement in March 2014 and Mrs Y went home with a package of care;
 - there was no record suggesting the home care package was inadequate;
 - Mrs X told the home care agency in September 2014 Mrs Y was going on holiday;
 - the Council first found out about the placement on 26 November 2014. There was no mention of Mrs Y being in a care home when Mrs X previously contacted the Council;
 - the home care agency said Mrs Y's condition was improving so it was surprising the family decided to place her in a care home without consulting the Council;
 - as the placement was a private arrangement, the law was clear that Mrs Y was ordinarily resident in Council C's area;
 - the Council agreed to take over funding the placement from 21 October 2015.
40. Mrs X's solicitor responded to the Council's letter of February 2016 saying:
- the Council should have carried out an assessment when the family asked it to;
 - Mrs X's own health had deteriorated since she placed her mother in respite care and she could no longer look after Mrs Y;
 - Mrs X cancelled care with the home care agency saying she had put her mother into care;
 - Mrs X contacted the Council before arranging the placement, but could not get any help;
 - there was never a plan for Mrs Y to remain in the care home. The arrangement was borne out of desperation.

- the report from the home care agency suggesting Mrs Y's condition was improving had no significance because Mrs X could not cope with the care of her mother between the carers' visits;
 - there was an outstanding amount due of about £20,000.
41. It seems Mrs Y's family changed their mind about her returning to Hackney because she remained in the care home until her death in March 2016.
42. The Council responded to Mrs X's solicitor's earlier letter saying:
- there was no request for help before the family moved Mrs Y and they did not report they were struggling to cope;
 - the home care agency would normally ask for a reassessment if there were concerns and it did not;
 - the Council's responsibility began when the assessment of need was concluded and presented to the funding panel. But, because of the way events turned out, the Council would take over funding responsibility from the date of the assessment (11 August 2015).
43. Mrs X's solicitor made a formal complaint to the Council in May 2016 saying the Council should have carried out a social care assessment in 2014, at least after the family contacted it in October 2014, if not earlier. The solicitor said if a social care assessment had been carried out when the family contacted the Council, funding and care would have been in place much earlier.
44. The Council responded in July saying:
- the first time officers were aware of Mrs Y being in a care home was 26 November 2014;
 - the family did not advise of their intention to place Mrs Y in a care home beforehand. The Council had checked with Mrs Y's GP in Hackney and the practice confirmed she was no longer registered as a patient and had moved permanently;
 - there may have been some delay in responding to the request for a needs assessment. So the Council would take responsibility for the fees from 26 March 2015.
45. Mrs X was not happy with the Council's response and her solicitor complained to us on her behalf.

Comments from the Council

46. The Council's position is:
- Mrs X did not say she was struggling to cope in September 2014, she did not consult with the Council and chose to make her own arrangements;
 - the agreement dated 28 September was between the care home and Mrs X and was with no council involvement or approval.

- Mrs X gave inconsistent information. On 24 October, she said she was no longer able to care for her mother. But her mother was at this time in residential care and she did not mention this;
- Mrs X contributed to the problem by not being open about her actions or working with the Council when she arranged the care home placement privately in September 2014;
- it made a reasonable offer in the circumstances. When a person moves into another local authority area permanently under private arrangements and is paying for their own care, they usually acquire an ordinary residence in the new area. The evidence suggests the move was permanent and not temporary (as the family suggests) as there was a permanent change of GP;
- it was not aware of the placement before 26 November 2014 and it should not be made to pay for care for a period before this date.

Conclusions

47. There is no evidence Mrs X contacted the Council before she placed Mrs Y in the care home at the end of September 2014. So we do not regard the Council to be at fault in its actions before Mrs X contacted it on 24 October 2014. Relying on the wording of the written agreement between Mrs X and the care home, we are satisfied the placement on 28 September 2014 was a private arrangement. We consider Mrs X intended it as a short-term measure to enable her to have a break and make more long-term arrangements for Mrs Y's care. The evidence strongly suggests Mrs X arranged the placement without the Council's prior knowledge or involvement.
48. Mrs X asked the Council for a review of Mrs Y's care on 24 October 2014, citing various difficulties in caring for her mother. The Council should have reviewed the case because *Prioritising Need in the Context of Putting People First*, which was the statutory guidance in force at the time, required it to carry out a review on request or if there was a change of circumstances. Both of these applied. The Council did not carry out a review or reassessment of Mrs Y until August 2015. This was 10 months after Mrs X's request. And although the statutory guidance in force until April 2015 did not impose a timescale for conducting reviews or assessments, the current statutory guidance requires assessments (and reviews) to be conducted within a reasonable and appropriate timescale depending on the urgency of the case. Our view is that absent a statutory timescale, local authorities must act reasonably in the circumstances. We consider taking 10 months to complete a review is fault given this case involved carer break down. We consider the Council should have responded and completed the review/reassessment within a month of the request in October 2014 – so by the end of November 2014.
49. It is not our role to decide Mrs Y's ordinary residence. Our role is to decide whether the Council has been at fault and if so, whether this caused injustice. The Council and Council C were in dispute about Mrs Y's ordinary residence. As it could not resolve the dispute within four months, the Council should have referred the case to the Secretary of State for a determination. The failure to refer the case to the Secretary of State was not in line with Direction 3 of the Care and Support (Disputes between Local Authorities) Regulations 2014 or with previous guidance on ordinary residence disputes and is fault.

50. Guidance (set out in paragraph 9) also explains the actions councils should take to fund services until the Secretary of State makes a determination. There was no attempt by the Council to apply the guidance during the period it was in dispute with Council C. This is further fault.
51. It is not clear why Mrs X failed to tell the Council in October 2014 that she had placed her mother in residential respite care. We have sympathy with the Council's view that Mrs X was not open about her actions. But this does not excuse the Council's later failure to take timely action once it became aware of the placement in November 2014. Once Mrs X said she could no longer cope with her caring role, there should have been a prompt reassessment of need/review, and, as there was an ongoing dispute with Council C about ordinary residence, the involvement of the Secretary of State should have been sought to resolve the matter. The failure to reassess in an appropriate timescale and refer to the Secretary of State is fault.
52. The Council accepted Mrs Y was ordinarily resident in Hackney from August 2015 because it funded her residential care from that date. The Council has given no cogent reasons for the refusal to backdate funding even though it took an unacceptably long time to assess Mrs Y. This is further fault.

Injustice

53. As set out in the previous section, the Council was at fault because it did not carry out a timely review/reassessment of Mrs Y. That reassessment should have been completed by the end of November 2014. If it had been, we find on a balance of probability and based on clear evidence in the case records, the Council would have arranged residential care for Mrs Y under its responsibilities under the National Assistance Act 1948 because:
 - An earlier assessment of Mrs Y in March 2014 concluded she required residential care due to risks associated with her dementia. She was considered too high risk at home with a home care package, unless another adult was present in her home as well. So the only reason Mrs Y was allowed to come home was because Mrs X agreed to be her live-in unpaid carer.
 - When Mrs X told the Council in October 2014 that she could no longer cope with her caring role, it meant the home care arrangement the Council had previously agreed as safe and appropriate, was no longer so.
 - The Council accepted funding responsibility for Mrs Y's placement from October 2015 and that she was ordinarily resident in Hackney from October 2015.
 - Council C accepted no funding responsibility or that Mrs Y was ordinarily resident in its area for the period September 2014 to September 2015.
 - The Council's position is contradictory; it accepts Mrs Y's ordinary residence in Hackney from October 2015 when Mrs Y had been in the same care home out of area for over a year, but does not accept her ordinary residence for the year before. The Council has given no reason for the distinction between the two periods. It is unclear how Mrs Y could have been ordinarily resident in Council C's area between October 2014 and October 2015 and then suddenly acquire ordinary residence in Hackney in October 2015 when she continued to live in Council C's area and there had been no other change in her circumstances.

54. With the breakdown of the informal care arrangements which ensured Mrs Y's safety in her own home, the only outcome of a review in October 2014 could have been Mrs Y's needs could only be met in residential care, which was in line with the view of the funding panel and the previous assessment in early 2014. So the Council was under a duty to arrange residential care under Section 21 of the National Assistance Act 1948.
55. There are fees outstanding to the care home that have not been paid and for which Mrs X has been invoiced. This is a debt that the Council, and not Mrs X, should pay, following the fault identified above.
56. We note the Council's position that it was not aware of the placement until 26 November 2014 and agree it would be unfair to place funding responsibility on its shoulders before that date. However, we are satisfied that if the Council had carried out a timely assessment in October 2014 when this was requested, the result would have been Mrs Y's needs could only be met by providing residential care, as her main carer was not willing to continue caring for her. That being the case, we find the Council should have funded residential care from 26 November 2014 which is about four weeks from the date that Mrs X asked for a review.

Decision

57. The Council delayed for nine months in carrying out an assessment of need. This is fault and caused financial loss. On a balance of probability, had the assessment been completed when it should have been, the Council would have taken over funding the placement from the end of November 2014.

Recommendations

58. To remedy the injustice, we recommend, within three months of this report, the Council settles the invoice with the care home based on its assessed weekly contribution between 26 November 2014 and 20 October 2015. This is £19,898. As Mrs X has already made some payments to the care home which are more than Mrs Y's assessed weekly contribution, the care home has agreed to reimburse those payments to Mrs Y's estate on receipt of the Council's payment.
59. We do not always recommend reimbursement of legal fees but in this case we consider it appropriate to recommend the Council pays Mrs X's reasonable legal costs. This is in line with our published *Guidance on Remedies*. It was reasonable for Mrs X to engage legal help in what was a complex matter, where she was dealing with a public body that failed to act for a lengthy period. Mrs X or her solicitor should provide the Council with evidence of payments made so the Council can check these are at a reasonable rate and proportionate to the advice provided.
60. The Council has accepted the above recommendations.