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Background Documents – Reports from Local Government and Social Care Ombudsman

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

**Investigation into a complaint against
North Yorkshire County Council
(reference number: 16 006 552)**

17 January 2018

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.

Key to names used

Mrs Y service user

Mrs X her daughter, complaining on behalf of Mrs Y

Report summary

Adult Social Care

Mrs X complains on behalf of her mother, Mrs Y, the Council's financial assessment is wrong because it should not treat gifted money as deprivation of assets.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice identified in this report, the Council should;

- apologise to Mrs X for its failure to complete a financial assessment in 2015 and its failure to evidence why it considers the gifted money to have been done with the intention of avoiding care charges;
- pay Mrs Y £250 to recognise the distress caused;
- complete a financial assessment for Mrs Y based on her circumstances in January 2015 including whether any deprivation of capital has occurred and repay any monies resulting from this reconsideration;
- review Mrs Y's current financial position and look at how Mrs Y's current debt to the care home can be reduced/settled to avoid her placement being put at risk; and
- review its current procedures and guidance for staff on how to deal with cases where deprivation of capital may have occurred.

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*)

The complaint

1. Mrs X complains on behalf of her mother, Mrs Y, the Council's financial assessment is wrong because it should not treat gifted money as deprivation of assets.

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*)
3. When the capital of a care home resident paying for her own care runs out, she can approach the council for financial assistance. The Council will first assess the suitability of the care home to meet the person's needs and will then complete a financial assessment. The Council may ask the family to pay a "top up" fee if the cost of the care home is higher than its standard local authority rate.

The Care Act and the Charging for Residential Accommodation Guide

4. When Mrs Y moved into the care home in 2007, the applicable guidance was the Charging for Residential Accommodation Guide (CRAG). This guidance applied for the period when the majority of gifts were made.
5. The Council's decision not to provide financial assistance was made after April 2015 when the Care Act was the applicable legislation.

Deprivation of Capital

6. CRAG states a local authority may consider that a resident has deprived herself of a capital asset to reduce her accommodation charge.
7. It also states there may be more than one purpose for disposing of a capital asset only one of which is to avoid a charge for accommodation. Avoiding the charge need not be the resident's main motive but it must be a significant one.
8. Applicable from April 2015, The Care Act 2014, Care and Support statutory guidance annex E covers issues relating to the deprivation of capital. The guidance states the following:
 - When undertaking or reviewing a financial assessment a local authority may identify circumstances that suggest that a person may have deliberately deprived themselves of assets to reduce the level of the contribution towards the cost of their care.
 - People should be treated with dignity and respect and be able to spend the money they have saved as they wish – it is their money after all. Whilst the Care Act 2014 represents an important step forward in redefining the partnership between the state and the individual, it is important that people pay the contribution to their care costs that they are responsible for. This is important to the overall affordability of the care and support system. A local authority should therefore ensure that people are not rewarded for trying to avoid paying their assessed contribution.

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- But deprivation should not be automatically assumed. There may be valid reasons why someone no longer has an asset and a local authority should ensure it fully explores this first.
 - Deprivation of assets means where a person has intentionally deprived or decreased their overall assets to reduce the amount they are charged towards their care. This means that they must have known that they needed care and support and have reduced their assets to reduce the contribution they are asked to make towards the cost of that care and support.
 - A person can deprive themselves of capital in many ways, but common approaches may be: (a) a lump-sum payment to someone else, for example as a gift; (b) substantial expenditure has been incurred suddenly and is out of character with previous spending.
9. Paragraph 8.27 of the Care and support statutory guidance states “People with care and support needs are free to spend their income and assets as they see fit, including making gifts to friends and family. This is important for promoting their wellbeing and enabling them to live fulfilling and independent lives. However, it is also important that people pay their fair contribution towards their care and support costs”.

How we considered this complaint

10. We have produced this report following the examination of relevant files and documents and discussions with the complainant.
11. We gave the complainant and the Council a confidential draft of this report and invited comments. The comments received were taken into account before the report was finalised.

What we found

12. Mrs Y suffered a stroke aged 80 and was hospitalised in 2007. Mrs Y was unable to return home so Mrs X and other family members found a place in a residential care home. Mrs Y moved from the hospital to the care home.
13. Mrs Y’s home was sold leaving her with capital of around £250,000. The family sought advice from a financial adviser. They paid him for his advice on how to invest Mrs Y’s money. Mrs X says he gave the family advice about making gifts saying they could gift up to £3,000 per person per year. However, there is no documentary record of the advice provided.
14. The Council accepts Mrs Y regularly made gifts to family members before she moved to the care home of about £20 to £30 for birthdays and Christmas. Between 2007 and 2014 members of Mrs Y’s family including her son, daughter, son in law, daughter in law and grandchildren received gifts of between £250 and £3,000 per year.
15. The family did not approach the Council for any financial assistance and paid the full cost of the care home from 2007 until January 2015. Mrs X contacted the Council in January 2015 to seek assistance with funding of Mrs Y’s care home placement as Mrs Y’s capital had reduced to about £23,000.
16. The Council completed an assessment and found it was appropriate for Mrs Y to remain in that care home. Pending completion of a financial assessment, the Council entered into a contract to pay Mrs Y’s fees and began paying the care home fees from January 2015. The home charged a higher rate than the standard

local authority rate. However due to the number of years Mrs Y had been resident and because the family said they could not afford to contribute, the Council agreed to pay this “top up”.

17. The Council met Mrs X to complete the financial assessment on 8 February 2015. During this meeting Mrs X advised the family had received payments from Mrs Y since she had been resident in the home. Mrs X provided information about the amounts paid to each family member since 2007. She says the payments ended in 2014 and the total paid was £74,250.
18. The Council took the view this gifting was deprivation of capital. On 27 April 2015 it terminated the contract with the care home and stopped making payments. It issued an invoice to Mrs X asking her to repay £6864.45 which was the amount it had paid for care since January 2015. The family has settled this invoice with the Council.
19. Mrs Y remains in the care home, now aged 90. All of Mrs Y’s monthly income is paid to the home but this does not cover the full amount charged. The care home has recently written to Mrs Y saying she owes it over £30,000 and it will take further action if this is not paid. Mrs X says there is no money to pay the debt and is worried the home will evict her mother.

Conclusions

20. The Council did not complete a full financial assessment for Mrs Y. Once Mrs X disclosed the level of gifting, the Council took the view deprivation of capital had occurred and treated the amount gifted as notional capital. It considered Mrs Y remained above the capital limits and so not eligible for financial assistance.
21. The Council calculated Mrs Y deprived herself of around £96,000. After we made enquiries the Council revised this to £77,000. Neither figure matches the amounts disclosed by Mrs X and the Council has provided no evidence to show how it calculated either figure. The Council should be ensuring it uses actual figures in any financial assessment.
22. CRAG and the care and support statutory guidance states that gifts to family can be treated as deprivation of capital. However, any deprivation must be with the intention of reducing the amount they are charged for their care. The Council accepts there was a pattern of gifting before Mrs Y went into the care home. It says it has treated the gifts as deprivation of capital because of the increased amounts gifted.
23. The Council has not provided any other evidence to show how it considered the gifts were made with the intention of avoiding care charges. The gifts were made over a number of years and there is no evidence of any haste by the family to dispose of Mrs Y’s assets. Mrs X argues there are other factors affecting the gifting. She says the financial adviser advised her to make the gifts. The Council states in a letter the advisor was no longer being recommended by the high street bank Mrs Y used due to “financial irregularities”. Mrs Y paid the full amount of her care from 2007 to 2016 and over 70% of her capital has been paid on care home fees. Mrs X says this clearly shows the gifts were not made with the intention of avoiding paying because she has actually paid for so long. Mrs Y was 80 years old when she moved into the care home. She had suffered a stroke and her prognosis was poor. Mrs X says no-one could predict how long Mrs Y would live and so it cannot be said the money was gifted with the intention of avoiding care charges nine years later.

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24. The care and support statutory guidance says people can spend their money as they wish. There is evidence of a gifting pattern before Mrs Y was aware that she might need residential care. However, the Council has calculated the full value of all gifts made since Mrs Y entered care to be deprivation. Mrs Y did not have capital at her disposal before she sold her house. The Council's decision to treat the full amount as deprivation does not take account of Mrs Y's right to continue to make gifts. The Council has failed to demonstrate that it has taken proper account of all the relevant facts and circumstances when making its decision. The Council's decision to treat the full amount of all gifts as deprivation, without supporting evidence, is fault.

Recommended action

25. To remedy the injustice identified in this report we recommend the Council should:
- apologise to Mrs X for its failure to complete a financial assessment in 2015 and its failure to evidence why it considers the gifted money to have been done with the intention of avoiding care charges;
 - pay Mrs Y £250 to recognise the distress caused;
 - complete a financial assessment for Mrs Y based on her circumstances in January 2015 including whether any deprivation of capital has occurred and repay any monies resulting from this reconsideration;
 - review Mrs Y's current financial position and look at how Mrs Y's current debt to the care home can be reduced/settled to avoid her placement being put at risk; and
 - review its current procedures and guidance for staff on how to deal with cases where deprivation of capital may have occurred.
26. 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

27. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mrs X and Mrs Y. The Council should take the action identified in paragraph 25 to remedy that injustice.

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

**Investigation into a complaint against
North Yorkshire County Council
(reference number: 17 002 767)**

21 February 2018

The Ombudsman's role

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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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Key to names used

Mrs A	The complainant
Mrs B	Her mother

Report summary

Adult care services

Mrs A complains the Council failed to provide enough help when her mother had to move from a residential care home to a nursing home, resulting in her being forced to accept a placement which requires a top-up.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council has agreed to pay Mrs A £500 for the time and trouble it has put her to.

We also recommend the Council:

- writes to Mrs A apologising for its failings;
- refunds £50 a week of the top-up paid by Mrs A and waives this from future payments, at least until it reviews the placement top-up;
- amends its Individual Placement Agreements to bring them into line with the Statutory Guidance;
- considers what action it needs to take to ensure:
 - assessments address the location of placements when this has been raised as an issue;
 - placements are not made which require a top-up when there is no top-up agreement in place;
 - best interest decisions are made when necessary; and
 - people are given a care and support plan, including a meaningful personal budget, before a placement in residential accommodation is made.

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*)

The complaint

1. The complainant, whom we shall refer to as Mrs A, complains the Council failed to provide enough help when her mother had to move from a residential care home to a nursing home, resulting in her being forced to accept a placement which requires a top-up.

The law relevant to this complaint

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 have produced this report following the examination of relevant files and documents and discussions with 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

What happened

5. Mrs A’s mother, Mrs B, lived in a residential care home (the Care Home). Mrs A has Power of Attorney for property and financial affairs.
6. During a visit on 19 March 2015 the Care Home told the Council it thought Mrs B now needed a nursing home placement. The Care Home said Mrs B had increased needs around mobility and resistance to care.
7. The Council visited Mrs B to reassess her needs on 14 May. It ordered a hoist for transfers and arranged a review in two weeks. Mrs A said her mother was waiting for the outcome of a financial assessment as her capital had fallen below the upper capital threshold of £23,250.
8. The Council visited Mrs B again on 29 May to review her needs. Although the Care Home had the new hoist it had not yet used it. The Council said it would visit again when the Care Home had used the hoist. The Council’s records say the fees were due to increase from £657.20 to £720 a week. Mrs A said there may be difficulties paying a top-up.
9. When the Council completed the financial assessment it agreed to pay the top-up. This is because it accepted it would not be in Mrs B’s best interests to move when the Care Home was currently meeting her needs.
10. The Council next visited on 30 July. The Care Home said the hoist “*was not that successful*” and it may no longer be able to meet Mrs B’s needs. The Council’s records say no definitive timescale was set but refer to 28 days to find another placement. The Council gave Mrs A information about alternative placements, noting only one would not involve a top-up and the others involved “*substantial*”

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- top-ups. Mrs A said they could manage in the short term but did not have the money to pay a top-up in the long term.
11. On 6 August the Council sent Mrs A the names of seven nursing homes. They included three which did not involve a top-up, including one out of area placement and Nursing Home X, which Mrs B eventually moved to.
 12. The Council visited Mrs B on 10 August to reassess her needs with Mrs A. It advised Mrs A to look for a placement with “*nursing bed/EMI potential*” which accepted its rates. EMI (Elderly Mentally Infirm) is a term used to refer to elderly people with more challenging forms of dementia or other mental health problems. The Council noted Mrs A had been doing everything to support the Care Home so her mother would not have to move.
 13. The Council spoke to Mrs A on 1 October. It said it had asked the Care Home to ask a District Nurse to complete an NHS Continuing Healthcare checklist to establish health needs and eligibility for Funded Nursing Care. Mrs A said she had looked at alternative placements but none were suitable. She said her mother would want to stay in her town so she could visit regularly. She asked what would happen if they could not pay a top-up. The Council said it would look for a placement which did not need a top-up but this may not be in her town. Mrs A questioned the suggestion that her mother should move somewhere she did not want to be.
 14. The Council visited Mrs B on 8 October to assess her needs with Mrs A. The Care Home said it did not have the staff to meet Mrs B’s need for help with transfers. It said it would have to give notice in two weeks. Mrs A said she was not happy for her mother to move to a care home 30 minutes drive from her town, as Mrs B would be anxious and want her to visit regularly but this would be difficult. She said she could not afford a top-up.
 15. An Occupational Therapist visited the Care Home to provide advice on transferring Mrs B.
 16. The Council visited Mrs B on 30 October. The Care Home had given notice for her to move by 31 January 2016. Mrs A said it would impact on her mother’s wellbeing if she had to move to a nursing home she could not visit as regularly. She said she could not pay a top-up. The Council and Mrs A agreed to meet again on 3 December to allow time for Mrs A to look at care homes which did not involve a top-up. The Council agreed to send her weekly updates on nursing homes with vacancies.
 17. On 4 November the Council gave Mrs A the names of two care homes which had vacancies and did not involve a top-up. One care home was approximately an hour’s car journey from Mrs A, and the other a 30 minute car journey. It also gave her the names of four care homes which involved a top-up. On 5 November the Council sent Mrs A the names of two other nursing homes which would not involve a top-up and a care home which would.
 18. On 9 November Mrs A told the Council she had visited care homes in her town and the vicinity. However, she said she could not take this further until she had an up-to-date assessment confirming her mother’s needs.
 19. On 10 November the Care Home told the Council Mrs A had liked the look of a dual registered (nursing and residential care) care home about a 30 minute car journey from her town which did not involve a top-up but it did not have a vacancy.

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20. On 11 November the Council told Mrs A it was trying to contact the District Nursing team (about eligibility for Funded Nursing Care) but had not had a response. It said this did not alter the fact that Mrs B had to move. It said they had discussed dual registered placements where Mrs B could have any nursing needs met if she needed that. After e-mailing Mrs A the Council left a message for the District Nursing team to get in contact. The Council also contacted the NHS's Continuing Healthcare team to find out if a checklist had been completed. It confirmed that it had and Mrs B would receive a full assessment for Continuing Healthcare.
 21. On 13 November Mrs A told the Council about the dual registered care home but said it did not have a vacancy. She said other homes did not look after people with dementia or were unsuitable as they had poor ratings from the Care Quality Commission (CQC).
 22. On 15 December Mrs A asked the Council to consider funding a placement in a Christian care home which involved a top-up, given the positive impact this would have on Mrs B's wellbeing. The Council identified six residential care homes which involved a top-up and six nursing homes which involved a top-up.
 23. On 18 December 2015 the NHS decided Mrs B was eligible for Funded Nursing Care. This meant she needed to move to a nursing home. The Council's records say a "*nursing placement is being sourced at NYCC rates and daughter [Mrs A] has been visiting suitable placements to meet her mother's needs in her best interests*".
 24. The Council completed its assessment of Mrs B's needs after receiving confirmation of her eligibility for Funded Nursing Care. The assessment identified the importance of her relationship with her daughter who "*continues to provide substantial support to [her] emotionally and socially and supports her to access outside activities. [Mrs B] relies on her daughter to visit regularly as they have a close relationship*". The assessment says Mrs B "*likes to be in [Mrs A's town] and this is important to her community links with the church nearby and with a singing group supported by [Mrs A]*". The assessment concludes "*Planned move to ensure minimal effect on [Mrs B's] emotional and mental health to seek alternative suitable placement to manage increased needs*". It says Mrs A was looking for a nursing placement. It also says Mrs B "*lacks capacity*". It says Mrs B's indicative personal budget was £21,000 (£402.74 a week).
 25. On 27 December the dual registered care home offered to assess Mrs B, although it did not have a vacancy. It told Mrs A it would charge £730 for an EMI residential room or £850 for an EMI nursing care room. On 29 December the Council told the care home Mrs B was not a self-funder so it would need to provide a bed which did not involve a top-up.
 26. On 6 January 2016 Mrs A told the Council her mother was next in line for a place at the Christian care home, which was prepared to negotiate a fee. She said this was her preferred choice.
 27. On 11 January Mrs A confirmed the Christian care home was her preferred choice. She said it was willing to charge a reduced rate of £638 (down from £895), with the Council paying £426, Funded Nursing Care paying £112 and the family paying £100. She said her mother was in hospital, having fallen out of bed and injured herself.
 28. On 14 January Mrs A told the Council they could pay a top-up "*for a short period*".

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29. On 18 January the Christian care home told the Council it did not have a vacancy and could not say when it would. The dual registered care home told the Council it was no longer accepting placements without a top-up and did not have a vacancy. The Council sent Mrs A a list of nursing homes with vacancies, including one in her town which it said did not involve a top-up. It asked Mrs A if she wanted the Council to ask that nursing home to assess her mother. It also mentioned Nursing Home X, which involved a top-up and is in the vicinity of Mrs A's town.
 30. When Mrs A replied she said the nursing home in her town said it was "*not dementia care registered*" when she visited a few months ago. She said Nursing Home X was the same but would consider whether nursing needs outweighed mental health needs when assessing people. She said this may not be the best way forward for her mother but she would visit Nursing Home X on 19 January.
 31. Mrs A called the Council on 19 January. She said she had visited Nursing Home X and would be happy for it to assess her mother.
 32. The nursing home in Mrs A's town says it had one room free on the top floor for a new resident on 18 January. It says it would have accepted the Council's rate (£426.30 a week) plus a top-up of £50. It says it may have waived the top-up, depending on the circumstances. It says it accepts people "*dependant on assessment in the late stages of dementia when their nursing needs outweigh their mental health needs, which we determine at assessment with the agreement of the social worker*".
 33. Nursing Home X told the Council, subject to its assessment of Mrs B, it would accept the Council's rate for a nursing bed, plus Funded Nursing Care and a £75 top-up, which it said Mrs A had agreed to pay.
 34. On 20 January Mrs A wrote to the Council asking it to explain what it would contribute to a placement at Nursing Home X. She noted it was currently paying £466 a week. She also noted there was a top-up of £75 a week at Nursing Home X. She said she needed a breakdown of the fees and top-up "*before I can fully commit should I choose to do so*".
 35. The Council told Mrs A the most it would pay for a nursing bed was £426.30 (£475.93 for residential care), with the NHS paying £112 for the nursing care. It said Nursing Home X would accept the Council's "*rate with a top-up of £75 from a third party*", which Mrs A had said she would pay. It said this meant Nursing Home X would receive £662.93 a week, including "*£475.93*" from the Council. It said a self-funder would have to pay much more than this.
 36. On 21 January Mrs A told the Council Nursing Home X had assessed her mother and confirmed it could meet her needs. She said it was not fair for the Council to move her mother to a higher level of care but then reduce its funding and expect her to pay a top-up. She asked the Council to confirm its funding of £475.93.
 37. The Council called Mrs A and apologised for saying it would pay £475.93 as it should have confirmed the rate for a nursing bed (£426.30).
 38. According to the Council's case notes, Mrs A called and said she was happy for her mother to move to Nursing Home X as it was important for her to be near her. But she had concerns about paying the top-up in the long-term as she may be retiring. She said she wanted a review of the placement in 12 months. The Council offered to find somewhere which would not need a top-up but said this may not be near Mrs A. Mrs A said she just wanted her mother to move to Nursing Home X as that would be in her best interests. The Council said it would

have to consider this new information. The Council noted it would not be in her mother's best interests to have to move again.

39. According to Mrs A's records of her contact with the Council, when asked to name homes which would accept the Council's rate, it mentioned the nursing home in her town. Mrs A said she had visited months ago and it was not "*dementia registered*". The Council told Mrs A a suitable room was available on 18 January. Mrs A's notes say the Council was "*evasive*" when asked if the nursing home in her town definitely accepted its rate. Mrs A said she could not commit to paying a top-up in the long term and asked the Council to review it after 12 months.
40. Mrs A asked the Council if the room would be suitable for her mother and it could guarantee there would be no top-up. She says the Council told her the home would have to assess her mother first. Mrs A did not take up the offer to have the nursing home in her town assess her mother. She says she was concerned about losing a potential suitable bed at Nursing Home X. Mrs A says the Manager told her it was not "*dementia registered*" and there was no bed available at the Council's rate when she visited in 2015. She says on two further occasions the Manager told her there was no bed available at the Council's rate. Information about the nursing home in Mrs A's town on the Care Provider's website confirms that it does not care for people with dementia. The Care Provider identifies homes which provide "*Nursing Dementia Care*" and/or "*Residential Dementia Care*", as opposed to those which provide "*Nursing Care*" and/or "*Residential Care*".
41. On 22 January Mrs A told the Council they had agreed to pay the £75 top-up for Nursing Home X. The Council noted it would pay the top-up if Mrs A could not continue to pay it in 12 months but did not tell Mrs A this.
42. Mrs B moved to Nursing Home X on 1 February. The Individual Placement Agreement (IPA) says the total cost was £501.26 (rising to £565.28 from 4 April), with the Council paying £426.26 and a third party top-up of £75 which the Council expected the "*provider to collect*". The IPA does not identify Mrs B's contribution from her weekly income as the Council was waiting for the outcome of a financial assessment. However, the IPA says Mrs B's contribution was for the "*provider to collect*". There is a section in the IPA for Mrs A to sign which says:
- "*I agree to make the payment direct to the provider of the amount specified in section 5(ii) above and understand that the Council is entitled to recover from me any unpaid Third Party contribution in respect of the Placement. I understand that my payments will continue for as long as the Person has need of the Placement and that these payments may be subject to change only in agreement with the Council. If I fail to make the contribution I accept that the Council reserves the right to terminate this Agreement and may seek an alternative placement for the Person*".

But Mrs A would not sign it.

43. Mrs B's 1 February care and support plan says the agreed personal budget was £26,067 (£501.30 a week).
44. On 2 February the Council noted:
- "*due to ongoing dispute regarding the third party payment contract issued with no Third Party Signature to [Nursing Home X] in order for the payment to be made. Family to pay top-up independently to [Nursing Home X]. Advice sought from contracting and the IPA states no private arrangement to be arranged outside the contract which is why the third party remains on the contract unsigned*".

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45. On 3 March 2017 the Council reviewed Mrs B's needs with Mrs A.
 46. On 4 May Mrs B's Social Worker wrote to Mrs A. She agreed to send her a copy of the March 2017 review. She said at the review Mrs A had said she felt she "could continue to pay the top-up and would not wish [Nursing Home X] to consider the NYCC room they have". She offered to arrange a financial assessment as Mrs B's capital was falling.
 47. Mrs A replied on 21 May. She said at the March 2017 review she had said "both my husband and I are now both retired and we can continue to pay the top-up for the time being but this may need to be reviewed". She said this was quoted in the report of the review, which also said "discussed 3rd party top-up and possibility of move to the NYCC bed if top-up is no longer available". She said the Social Worker had told her the affordable bed was unavailable at the time. She said the Manager of Nursing Home X had confirmed this and said the room would not be suitable for her mother's needs because of the size of the room, the equipment needed to hoist her and any disorientation a move would cause her. She asked if there was a risk assessment on any proposed move to this or any other room.
 48. When she replied on 6 June, the Social Worker said before suggesting a move to another room Nursing Home X had said the room could accommodate Mrs B and her equipment and offered to put her name on the waiting list. She said Nursing Home X would do an assessment before Mrs B moved to the room

What should have happened

49. Section 26 of the Care Act 2014 says a personal budget is a statement which specifies the cost to the council of meeting an adult's needs, the amount the adult must contribute and how much the council will pay. A personal budget can also specify other public money available to meet someone's needs (e.g. funded nursing care).
50. The Department of Health's Care & Support Statutory Guidance (the Statutory Guidance) says:
 - "Where a local authority is meeting needs by arranging a care home, it is responsible for contracting with the provider. It is also responsible for paying the full amount, including where a 'top-up' fee is being paid. However, where all parties are agreed it may choose to allow the person to pay the provider directly for the 'top-up' where this is permitted. 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". (Paragraph 8.33)
51. Annex A provides guidance on "Choice of accommodation and additional payments".
 - "A person must not be asked to pay a 'top-up' towards the cost of their accommodation because of market inadequacies or commissioning failures and must ensure there is a genuine choice. The local authority **must** ensure at least one option is available that is affordable within a person's personal budget and should ensure that there is more than one." (Paragraph 12)
 - "Local authorities have specific duties to shape and facilitate the market of care and support services locally, including ensuring sufficient supply. As a result, a person should not have to wait for their assessed needs to be met. However, in some cases, a short wait may be unavoidable, particularly when a person has

chosen a particular setting that is not immediately available. This may include putting in place temporary arrangements – taking into account the person’s preferences and securing their agreement – and placing the person on the waiting list of their preferred choice of provider for example. It should be remembered however that such arrangements can be unsettling for the person and should be avoided wherever possible.” (Paragraph 13)

- “In such cases, the local authority must ensure that in the interim adequate alternative services are provided and set out how long the interim arrangement may last for. In establishing any temporary arrangements, the local authority must provide the person with clear information in writing on the detail of the arrangements as part of their care and support plan. As a minimum this should include the likely duration of the arrangement, information on the operation of the waiting list for their preferred setting alongside any other information that may be relevant. If any interim arrangements exceed 12 weeks, the person may be reassessed to ensure that both the interim and the preferred option are still able to meet the person’s needs and that remains their choice.” (Paragraph 14)
- “The local authority must ensure that the person paying the ‘top-up’ is willing and able to meet the additional cost for the likely duration of the arrangement, recognising that this may be for some time into the future. Therefore it must ensure that the person paying the ‘top-up’ enters into a written agreement with the local authority, agreeing to meet that cost. The agreement must, as a minimum, include the following:
 - *“the additional amount to be paid;”*
 - *“the amount specified for the accommodation in the person’s personal budget;”*
 - *“the frequency of the payments;”*
 - *“to whom the payments are to be made;”*
 - *“a statement on the consequences of ceasing to make payments;”*
 - *“a statement on the effect of any increase in charges that a provider may make;”*
 - *“a statement on the effect of any changes in the financial circumstances of the person paying the ‘top-up’”.*

(Paragraph 23)

- “Ultimately, if the arrangements for a ‘top-up’ were to fail for any reason, the local authority would need to meet the cost or make alternative arrangements, subject to a needs assessment. ... Local authorities should therefore maintain an overview of all ‘top-up’ agreements and should deter arrangements for ‘top-up’ payments to be paid directly to a provider.” (Paragraph 25)

52. Paragraph 29 says there are three options for collecting top-ups:

- *“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”; or
- “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”.

Conclusions

53. The Council could not agree Mrs B’s personal budget, or her care and support plan, until the NHS confirmed her eligibility for funded nursing care. The Council was not at fault over the time taken to do that.
54. The Statutory Guidance says councils must ensure at least one “affordable” option is available within someone’s personal budget. An “affordable” option is one which does not involve a top-up. The Council gave Mrs B a personal budget of £501.30 a week but this included the top-up. That was fault. When the NHS confirmed Mrs B’s eligibility for Funded Nursing Care in December 2015 the Council should have produced a care and support plan confirming a personal budget of £426.30 a week plus Funded Nursing Care of £112. It would then have been clear what public funding was available to meet her mother’s needs. But the Council did not produce a care and support plan until the placement at Nursing Home X had been agreed. Nevertheless, the Council explained what it was prepared to pay for a nursing home placement and what Funded Nursing Care would contribute.
55. The Council did not evidence the availability of an “affordable” nursing home. That was fault. Only after a care home has assessed someone and agreed to provide an affordable place can the Council evidence its availability. The Council says it offered an affordable place at the nursing home in Mrs A’s town on 18 January. However, the information provided by that nursing home shows this was not necessarily the case as it expected a top-up for the room available on 18 January.
56. The information the Council gave Mrs A on care homes which would not need a top-up was not always reliable. The dual registered care home was on the list but when contacted was not prepared to accept a placement without a top-up. The Council says this was because the management of the home had changed its fees. But that does not alter the fact the information about the dual registered home was inaccurate. Also, the nursing home in Mrs A’s town says it would have expected a top-up for the room available on 18 January.
57. According to the information on CQC’s website, the nursing home in Mrs A’s town does not specialise in caring for people with dementia. Although it says it sometimes accepts people in the late stages of dementia, that did not apply to Mrs A in January 2016 although it appears her nursing needs outweighed the needs arising from her dementia. It is therefore unclear whether the nursing home in Mrs A’s town would have accepted her mother (with or without a top-up).
58. In August 2015 the Council told Mrs A Nursing Home X had an affordable room. But in January 2016 the room available needed a top-up. There is nothing unusual about that, as many care homes with affordable rooms will also have rooms for which there is a higher charge. However, the Council should have been seeking to move Mrs B to an affordable room at Nursing Home X as soon as one became available. The failure to do so was fault. It was not until March 2017 that the Council raised the possibility of Mrs B moving to an affordable room. Mrs A

questioned whether the room would be big enough to meet her mother's needs and whether moving would adversely affect her mother's wellbeing. Nevertheless, she confirmed they were prepared to continue paying the top-up, despite the fact she and her husband have now retired.

59. Mrs A made it clear she did not think her mother should be expected to live somewhere she would not be able to visit frequently, as this would have a negative impact on her health and wellbeing. The Council's assessment of Mrs B does not clearly address this issue. That was fault. Given Mrs A's very clear views, the assessment should have said whether or not the benefits for Mrs B's wellbeing from being close to her daughter were such that she could not be placed too far away. The Council disputes this but on 21 January 2016 it told Mrs A an affordable placement would not necessarily be close to her home.
60. The Council told Mrs A to look for a care home with "*nursing bed/EMI potential*". It says its aim was to "*future proof*" the placement and avoid another move. The Care Quality Commission registers care homes to provide residential care or nursing care. It also lists the service users accepted by each care provider, which can include: adults aged 65+; mental health; physical disability; and dementia. CQC does not identify a category of service user as "*EMI*", although it is a term still used by many care homes.
61. Mrs B has dementia. But that does not mean she needs or is likely to need "*EMI*" care in the future. It was therefore unhelpful for the Council to tell Mrs A to look at care homes with "*EMI potential*". That was fault. This caused Mrs A injustice as it put her to the unnecessary trouble of visiting care homes prepared to take someone with challenging behaviour.
62. The Council did not comply with the Statutory Guidance as it failed to enter into a top-up agreement with Mrs A. That was fault. It should not have placed Mrs B in Nursing Home X without a top-up agreement. Mrs A would not sign the IPA agreeing to pay a top-up as she was not prepared to commit to paying it in the long term. As Mrs B did not have the capacity to decide on her placement herself, the Council should have held a best interest meeting, under the Mental Capacity Act 2005, to decide where she should live before placing her. This would have involved considering all the options, including an affordable option, taking account of the impact on Mrs B of a move away from her daughter. The Council says it followed the best interest principles. For an important decision, such as placing someone in a care home, this needs to be done formally.
63. It appears from its IPA that the Council's default position is for top-ups to be paid directly to care providers. The Statutory Guidance says such arrangements are to be deterred and only accepted when all the parties agree. Presenting this as the default position does not comply with the Statutory Guidance. The IPA also provides for the resident's contribution to be paid directly to care providers. That also does not comply with the Statutory Guidance. The Council needs to amend its IPAs to bring them into line with the Statutory Guidance.
64. The Council did not evidence the availability of an affordable nursing home. It points out that Mrs A did not take up its offer to ask the nursing home in her town to assess her mother. But the information from that nursing home does not support the claim that the room available was affordable, as it expected a top-up of £50 a week. Given that Nursing Home X agreed to take Mrs B, on the basis that her nursing needs outweighed her mental health needs, it seems likely the nursing home in Mrs A's town would have made the same decision. However, it seems unlikely it would have accepted her without a top-up, given that she had

both nursing and mental health needs. Within the context, Mrs B's personal budget should have been £481.26 a week (plus funded nursing care). The Council should only have asked Mrs A to pay a top-up of £25 a week at Nursing Home X. The Council should therefore refund £50 a week of the top-up she has paid.

65. There is some doubt over whether the room at the nursing home in her town would have been suitable for Mrs B, given the need for space for hoisting equipment. However, weighed against that doubt is Mrs A's clear preference for Nursing Home X, reflected in the decision not to accept the offer of an assessment by the nursing home in her town.
66. Although the Council was at fault for waiting until March 2017 to explore the possibility of moving Mrs B to an affordable bed at Nursing Home X, Mrs A did not pursue this. She confirmed they remained content to pay a top-up, despite the fact she and her husband have now retired.
67. When responding to the draft of this report, the Council offered to pay Mrs A £500 for the trouble it has put her to.

Recommended action

68. The Council has agreed to pay Mrs A £500 for the time and trouble it has put her to.
69. We also recommend the Council:
 - writes to Mrs A apologising for its failings;
 - refunds £50 a week of the top-up paid by Mrs A and waives this from future payments, at least until it reviews the placement;
 - amends its Individual Placement Agreements to bring them into line with the Statutory Guidance;
 - considers what action it needs to take to ensure:
 - assessments address the location of placements when this has been raised as an issue;
 - placements are not made which require a top-up when there is no top-up agreement in place;
 - best interest decisions are made when necessary; and
 - people are given a care and support plan, including a meaningful personal budget, before a placement in residential accommodation is made.

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

70. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mrs A and Mrs B. The Council should take the action identified in paragraphs 68 and 69 and to remedy that injustice.

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

**Investigation into a complaint against
North Yorkshire County Council
(reference number: 17 001 003)**

21 February 2018

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.

Key to names used

Mrs C	The complainant
Mrs D	Mrs C's late mother

Report summary

Adult care services

Mrs C complains the Council misinformed her about the charges for her mother's (Mrs D) care in a care home.

Finding

Fault found causing injustice and recommendations made.

Recommendations

We recommend the Council:

- writes to Mrs C apologising for its failings;
- refunds the estate the top-up for the period 19 August 2015 to 16 June 2016;
- reviews procedures to ensure:
 - officers document all information given to customers about care charges;
 - the correct placement cost is on record and is communicated to the customer before they move in;
 - they minimise delays in financial assessments;
 - care and support plans include the client contribution in the personal budget;
 - top-up payments are no longer routinely collected by care homes;
- reviews cases where there is a deferred payment agreement and a top-up to ensure there is also a top-up agreement.

The Council has agreed to carry out these recommendations.

The complaint

1. Mrs C complains North Yorkshire County Council (the Council) misinformed her about the charges for her late mother Mrs D's care in a care home.

The law relevant to this complaint

Our 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*)

Law and guidance

3. Where a council assesses a person's needs and agrees to provide care, it should set a personal budget in a care and support plan. 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*)
4. Councils are entitled to charge people towards the cost of a care home placement. They complete a financial assessment, applying charging rules in regulations and guidance to determine how much a person pays towards the cost of their residential care. People who have over £23,250 (including property) pay for the full cost of their residential care home fees. However, once their capital has reduced to under £23,250, they pay an assessed contribution towards their fees. (*The Care and Support (Charging and Assessment of Resources) Regulations 2014; Care and Support Statutory Guidance 2014 (CSSG)*)
5. Guidance requires councils to make sure there is information and advice available in an appropriate format to ensure residents and their representatives understand charges. (*CSSG paragraph 8.3*)
6. When carrying out a financial assessment, a council must ignore the value of a care home resident's property for the first 12 weeks after their stay becomes permanent. This means the council will assist with funding of the placement for the first 12 weeks. Funding in the period is called a "12-week property disregard". (*CSSG paragraph 45(a), Appendix B*)
7. Many people who own their own home are not eligible for financial help from a council to cover their care home fees because their property is worth more than £23,250. A deferred payment agreement (DPA) prevents eligible home owners from having to sell their home to pay for care home fees. If most of the person's money is tied up in their property, a DPA means they do not have to sell their home immediately because the council pays part of the fees. The person signs a legal agreement with the council saying the money will be repaid later. The council places a legal charge on the property through the Land Registry. This ensures the money it is owed is repaid later, when the home is sold or from the person's estate.

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8. Guidance on DPAs says the following.
- To make well-informed choices, people must access appropriate information and advice before taking out a DPA and be kept informed about it. (**CSSG Annex B paragraph 20**)
 - A council must provide information in a way that is clear and easy to understand. (**CSSG, Annex B paragraph 22**)
 - A council must tell a person who is interested in a DPA how the scheme works including: deferral of the fees, security, how much can be deferred, the circumstances when the agreement may end, interest, administration charges and eligibility. The council must also give an overview of advantages and disadvantages of a DPA and explain there are other options for paying for care and suggest the person takes independent financial advice. (**CSSG paragraph 9.26**)
 - A council should provide easy to read information about how the DPA scheme works. (**CSSG paragraph 9.27**)
 - Information and advice should be given at the earliest opportunity during the 12-week property disregard (see paragraph 7). This is so a person has a DPA in place when their placement in the care home becomes permanent. (**CSSG paragraph 9.74 and Annex B paragraph 29**)
 - A council should make sure people sign or clearly affirm they have received adequate information on options for paying for their care, that they understand how the DPA works and understand the agreement they are entering into; and that they have had the opportunity to ask questions about the contract. (**CSSG paragraph 9.80**)
 - People should receive updates at least every six months of the amount of fees deferred, of interest and administrative charges accrued to date, and of the total amount due and the equity remaining in the home. The update should set out the amount deferred during the previous period, alongside the total amount deferred to date, and should also include a projection of how quickly someone would deplete all equity remaining in their chosen form of security up to their equity limit. (**CSSG paragraph 9.85**)
9. The Department of Health's FAQs on the Care Act 2014 says:
- “Under the Care Act, local authorities have powers to charge for care and support to cover the costs they incur when contracting for care. The local authority can, therefore levy charges from the date when it starts to incur costs to meet a person's care and support needs. However, we would usually expect the local authority to work out how much the adult can afford to pay for their care and support before the local authority collects any money from them. An exception to this would be where a person refuses to co-operate with the financial assessment. We would expect a local authority to complete a financial assessment as quickly as possible to avoid people being faced with large and unexpected bills”.* (**Question 101**)
10. A council must arrange or provide a person with a placement in their preferred care home if:
- the care and support plan specifies the adult's needs are to be met by accommodation of a specific type;

- the preferred care home is of the same type specified in the care and support plan, is suitable and available;
- the care provider is not the council and it (the care provider) agrees to provide the service on the council's terms.

If the preferred care home costs more than the adult's personal budget, then there must be another person willing and able to pay the extra cost ('top-up'). The statutory guidance emphasises the requirement for real choice and that the council must ensure at least one care home is affordable within the personal budget. (*Care Act 2014, section 30 and Care and Support and After-Care (Choice of Accommodation) Regulations 2014, regulations 2 and 3(2), CSSG Annex A paragraph 12*)

11. In most cases, the top-up must be paid by a third party and not by the resident. But a resident is allowed to pay their own top-up during the 12-week property disregard and where there is a DPA. (*Care and Support and After-Care (Choice of Accommodation) Regulations 2014, regulation 5(5) and CSSG Annex A, paragraph 39*)
12. Guidance requires a council to ensure the top-up payer is able to meet the cost. Therefore it must enter into a written agreement with the payer. The agreement must include:
 - the additional amount to be paid;
 - the amount specified for the accommodation in the person's personal budget;
 - the frequency of the payments;
 - to whom the payments are to be made;
 - provisions for reviewing the agreement;
 - a statement on the consequences of ceasing to make payments;
 - a statement on the effect of any increases in charges that a provider may make;
 - a statement on the effect of any changes in the financial circumstances of the person paying the 'top-up'. (*CSSG, Annex A, paragraph 23*)
13. Before making the top-up agreement, the council must provide the top-up payer with sufficient information so they understand it. (*CSSG, Annex A, paragraph 24*)
14. Councils should avoid making care providers collect top-ups. Guidance explains "if the arrangements for a 'top-up' were to fail for any reason, the local authority would need to meet the cost or make alternative arrangements, subject to a needs assessment Local authorities should therefore maintain an overview of all 'top-up' agreements and should deter arrangements for 'top-up' payments to be paid directly to a provider". (*CSSG, Annex A, paragraph 25*)
15. In 2015, we issued [Counting the cost of care](#), which identified common faults in complaints about charging for care. The report stressed the importance of giving people the correct information about fees, top-ups, deferred payments and contributions at the right time.

How we considered this complaint

16. We produced this report following the examination of relevant files and documents and discussions with the complainant.

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17. 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

18. Mrs C and her brother managed their mother's (Mrs D) finances on her behalf as her attorneys. Mrs D went into residential care for respite in April 2015 after a hospital admission. The care and support plan said the placement cost the Council £457. There is no information about contributions on this, or any later care and support plan.
19. A social worker met with Mrs C and Mrs D at the end of April. The social worker noted she advised Mrs D of the 12-week property disregard and that she could have a deferred payment agreement (DPA), but she gave no figures.
20. Mrs D moved into a second care home (the Care Home) in June. The Council's standard rate for residential care was £475 a week. This was a permanent placement with a full cost of £850 a week. There is no evidence the Council told Mrs C of this figure when she was looking for permanent placements. The support plan of July 2015 gave a personal budget of £24,750 (or £475 a week) for Mrs D's care.
21. A financial assessment was not undertaken until a visit to Mrs C in August, when Mrs D had been in residential care for five months. The benefits and assessment officer wrote to Mrs C on 5 August with an initial financial assessment form which had been completed during the visit. This set out Mrs D's income and capital, which included a property. The form also detailed Mrs D's property expenses (insurance, water rates etc).
22. A note by the social worker dated 18 August says she told Mrs C her mother would be on a DPA for the full cost of the placement. The social worker also noted that *'due to the cost being above NYCC rates, top-up fee will be added to the deferred payment'*. It is not clear from the record whether the social worker discussed the top-up with Mrs C or just noted for the file there was a top-up and it would be added to the DPA.
23. The benefits and assessment officer told us, based on her recollection and her notes of her meeting with Mrs C, that:
- they discussed DPAs and other options for paying for care like annuities and renting out the property. She suggested the family take independent advice and left them the DPA application form, a 'paying for care' leaflet and information about DPAs. The Council's records said the cost of the Care Home was £475 a week. Based on her income, Mrs D's weekly contribution would have been £268; and
 - she told Mrs C a different team would calculate the amount which would accrue under the DPA. She said the DPA amount would be the difference between £475 and £268.
24. The Council told us a box on Mrs D's assessment form suggests it provided a leaflet called 'Paying for Care'. We note the end of the assessment form listed nine leaflets issued to Mrs C. Mrs C denies she ever received 'Paying for Care'.
25. An internal note by an officer in the brokerage team (which finds placements for people) said the Care Home would collect the client contribution of £265.88 a

week from October. The officer also noted the cost of the placement was £850 a week.

26. Mrs C applied for a deferred payment for Mrs D. The Council acknowledged the application at the end of August.
27. Mrs D's support plan of August gave the cost of the placement at £850 a week and an estimated personal budget of £17,700 a year (or £340 a week). The figure for the final weekly personal budget was £44.20. The latter figure is probably an error because a care home placement could not cost £44.20 a week.
28. The Council first wrote to Mrs C about charges on 11 September 2015. The letter said Mrs D's weekly charge (from her income) was:
 - £102.81 from 24 April;
 - £121.73 from 30 June (the date Mrs D moved to the second Care Home); and
 - £265.88 a week from 22 September.

The letter said the Council had disregarded Mrs D's home for 12 weeks (from 30 June to 21 September). It enclosed a breakdown of how the figures had been calculated saying "*a third party payment of £374.07 a week will be accrued on a deferred payment, with effect from 30 June 2015*".

29. The Council wrote to Mrs C on 19 November saying her application for a DPA had been successful and enclosed two copies of the agreement for her to sign and return. The letter did not explain the contents and there is no evidence to suggest it included the Council's standard information leaflet about deferred payments. The Council says the benefits and assessment officer had already given information on DPAs when she visited in August. Mrs C denies receiving any leaflets.
30. The Council, Mrs C and her brother signed the DPA in November 2015. The agreement allowed Mrs D to defer the weekly charge payable from her capital. This would be offset against the value of her property. The intention was for the Council to place a legal charge on the property so when it was sold, the loan would have to be repaid to the Council. A schedule to the agreement gave the weekly charge as £850 and said this was the care charge '*for which the loan was provided by the local authority*'. The agreement was to start from 22 September.
31. The Council wrote to Mrs C again on 1 December. This letter explained the gross cost of care was £850 a week. Of this, £270.28 was Mrs D's weekly contribution (from her income) and £579.72 a week was to be deferred under the DPA. The letter also set out the one-off and yearly costs and interest the Council charged for setting up the arrangement. The Council said it would send a four-weekly invoice for information only, showing the amount deferred.
32. In February 2016, the finance team wrote to Mrs C explaining the Council had disregarded the value of Mrs D's house for 12 weeks. The letter said her application for a deferred payment was 'in progress' (because the legal paperwork for completing the charge on Mrs D's home had not been completed). The letter said the 12-week disregard period ended on 21 September 2015 and the cost of the placement was £850 a week from 22 September. Of this, £265.88 was Mrs D's contribution (from her income) with £584.12 being deferred against the value of her property. The letter went on to say:

"for the 12-week disregard period, an invoice will also be sent for the third party contribution that was agreed would be added to the accrued charges. These

invoices will be marked 'for information only'. They will be for the period 30 June 2015 to 21 September at £374.07 a week".

33. Mrs C and the finance officer spoke at the end of February 2016. The finance officer's note of that call says:
- "[Mrs C] mentioned she was unaware that a third party top-up was being charged and that she had not been advised about this at my visit. I advised Mrs C that we would not have known about this, but we did discuss that the Care Home may charge more than the rate allowable... I asked Mrs C who she had spoken to about the third party top-up as a decision has already been made to accrue this as a deferred payment. Mrs C advised me that no-one had discussed this with her and she has had no information about this".*
34. The finance officer told a second social worker that, when she completed the financial assessment, she understood the placement was 'at NYCC's rates' and that an agreement to accrue the top-up would have been made by a different officer later.
35. Mrs C spoke with the second social worker at the beginning of March and denied having a conversation about a top-up and said, if she had known about it, she would have made a different decision about the placement. She then spoke to a team manager at the end of March, saying she was confused about the charge and did not think she had received the right information when deciding on the Care Home. She said she might have chosen a cheaper home nearer her brother if she had realised the cost implications.
36. A support plan of May said the cost of Mrs D's placement was £850. There was no personal budget on the plan.
37. Mrs C complained to the Council in May, saying she had not been fully advised about the charges for Mrs D's care until February 2016, that she should have received full information when the family were looking at placements, and the Council had caused her and Mrs D distress.
38. Mrs C and her brother met with the Council. They said the difference between what they had previously been told and what the Council was now saying was £350 a week, and the higher charge had not been discussed or agreed. The Council promised to respond under its complaints procedure and provide a clear break down of the cost and explain the terminology.
39. The Council's response to Mrs C's complaint said:
- there was a delay in completing the financial assessment because of a shortage of staff;
 - when the finance officer visited to complete the financial assessment in August 2015, the Council's computer system wrongly showed the cost as £457.94 (which was the cost of the first placement) which caused confusion. The Council accepted this information played a part in the family's decision to place Mrs D in the Care Home; and
 - the finance officer discussed DPAs and the 12-week property disregard with Mrs C.

40. The complaint response broke down the charges as follows:

Service type and home	Dates	Weekly cost (total)	Mrs D's charge from income	Third party payment	Council's contribution
Temporary (respite)	24/4/15 to 29/6/15	£457.94	£102.81	nil	£355.13
Permanent (12-week property disregard)	30/6/15 to 21/9/15	£850	£121.73	£374.07 (deferred)	£354.20
Permanent (DPA)	22/9/15	£850	£265.88	nil	£584.12 (DPA)

41. The complaint response also said:

- there were no rooms at the Care Home so it was agreed Mrs D would go on the waiting list and stay at the first care home until there was a vacancy;
- a social worker explained in a meeting on 18 August 2015 there would be a 'third party top-up' and this would be added to the DPA; and
- there was no evidence of any discussion with Mrs C about top-ups between the date Mrs D moved into the Care Home (30 June) and 18 August 2015. So the Council would pay the top-up for this period only.

42. Mrs D died in December 2016.

43. Mrs C told us:

- a respite placement had been urgent because the hospital said Mrs D was ready for discharge and she could not stay in hospital;
- she was unsure how to go about choosing a care home and a friend advised her to go through social services;
- she considered several care homes in a different area but eventually decided on one in the village where Mrs D lived (the Care Home);
- she told the social worker about the Care Home and when a vacancy came up in June 2015, Mrs D moved there;
- she did not receive a copy of the Council's leaflet on paying for care;
- there were other people with DPAs which included a top-up and they did not have a top-up agreement either.

44. The Council told us its policy is for care homes to collect client contributions and top-ups on its behalf. It also told us it considered the first care home would likely have been a suitable permanent placement for Mrs D, but it did not explore this with the family because they had chosen the (second) Care Home.

Conclusions

45. The Council's actions in this case were confused and confusing, and fell short of standards in applicable law and guidance. The Council was at fault because:
- Mrs D went into residential care in April 2015. The Council did not send written details of the charge to Mrs C, her representative, until September. There was a backlog of customers waiting for financial assessments. The Department of Health has emphasised its expectation that councils should complete financial assessments promptly to avoid people being faced with large and unexpected bills. The Council took five months to complete and communicate the outcome of a financial assessment. The Council accepted there was a delay and apologised in its complaint response;
 - the care and support plans of July and August 2015 gave incorrect personal budgets. The May 2016 plan gave no personal budget. None of the plans gave Mrs C's contribution. They failed to comply with section 26 of the Care Act;
 - the Council did not update its computer records to show the cost of the second placement when Mrs D moved from respite care to permanent residential care in June 2015. So when the benefits and assessment officer visited Mrs C in August, the figures she gave were wrong. The Council gave incorrect figures based on out of date information;
 - the Council did not offer Mrs D a placement without a top-up. It says this was because the family had 'chosen' the Care Home. We do not consider the family had a meaningful choice that was within the law because they were not offered any care provision within Mrs D's personal budget. The Council failed to act in line with section 30 of the Care Act and the regulations and statutory guidance;
 - Mrs D could likely have remained in the first care home placement permanently at a cheaper rate and then there would have been no need for a top-up. But the Council did not tell her about the cost of either of the care homes when she was considering different placements for her mother. The Council cannot show it told Mrs C in writing about the cost of the Care Home or about the top-up until a letter in September 2015, telling her it was £347 a week. This was contrary to statutory guidance;
 - the Council should have put in place a top-up agreement. The Council did not act in line with the guidance set out in paragraphs 12 and 13 and this was fault. There was no top-up agreement and no evidence any written information was provided on top-ups at the start of the placement. We are not satisfied the Council told Mrs C that the Care Home was more expensive before Mrs D moved in; the first written statement about the top-up was the Council's letter of September 2015, by which time Mrs D had been in the Care Home for over three months;
 - the Council's references in correspondence to a *third party* top-up were misleading because the top-up in this case was not paid by a third party, but from Mrs D's own funds;
 - the Council should have given early information and advice about the deferred payment scheme. The Council claims officers gave oral information in meetings in 2015. But it cannot show any written information was given to Mrs C at the earliest opportunity. It cannot show it acted in line with the guidance in paragraph 8;

- the DPA should have been in place by the end of the 12-week property disregard period – so by 22 September 2015. The Council did not confirm it had accepted Mrs C’s application until mid-November. The aim was to ensure funding was in place when the placement became permanent, so the Council did not act in line with the guidance. Moreover, the Council’s letter in February 2016 referred to Mrs C’s application for a deferred payment being ‘in progress’ when the Council had already confirmed in writing in November 2015 the application had been accepted. The correspondence was confusing;
- the Council said in correspondence in December 2015 it would send four weekly invoices showing the amount deferred. It did not;
- the Council’s default position is for top-ups to be paid directly to care homes. Statutory guidance says this type of arrangement is to be discouraged. Presenting this as the default position is contrary to statutory guidance.

Injustice

46. The Council’s actions caused Mrs C avoidable confusion and distress at a time which was already stressful for her. It meant she was faced with a bill much larger than she had anticipated. Until February 2016, Mrs C thought the charge for her mother’s care would be far less than the Council assessed it to be. Much of this confusion was caused by the Council’s failure to update its computer system in June 2015 to reflect the change to a more expensive second placement.
47. The delay in issuing the DPA caused no financial loss because the Council drafted the agreement to start on 22 September 2015 which was the day after the end of the 12-week property disregard. But it caused Mrs C further uncertainty and confusion.
48. We accept Mrs C’s assertion (documented in the Council’s records in February 2016) and are satisfied she would not have chosen the second higher cost placement had she been properly and accurately informed of the charges at the time she was looking at care homes.

Agreed action

49. Our recommendations aim to restore the person affected to the position they would have been in but for the fault and to minimise recurrence in similar cases. In this case there is a quantifiable financial loss to Mrs D’s estate.
50. We do not always recommend reimbursement of care home fees a council is entitled to charge. In this case, we have taken into account the Council’s letter of 1 December explaining £579.72 a week was to be deferred and the earlier letter of September 2015 setting out a ‘third party’ top-up of £374.07. This correspondence is evidence the Council **did** make Mrs C aware of the charges, albeit in the context of having also given her much contradictory information about costs and charges at other times.
51. We consider:
 - the lack of a top-up-agreement;
 - the lack of timely written information about deferred payments at the appropriate time or at all;
 - the confusing and contradictory information about costs and charges given in meetings;

means there are grounds to recommend the Council reimburses the estate an amount equivalent to the top-up from 19 August 2015 (when the Council started applying a top-up) to the date of the Council's complaint response (16 June 2016). The Council has agreed to do this within one month of this report.

52. The Council has also agreed to apologise to Mrs C within one month of this report.
53. To minimise the risk of recurrence, the Council has also agreed, within three months, to a review of council procedures to include:
- ensuring officers document all information given about DPAs, contributions and top-ups;
 - reviewing all cases where there is a DPA and top-up; and ensuring each has a top-up agreement;
 - ensuring the correct placement cost is on record and is communicated to the customer before they move in;
 - minimising delays in financial assessments;
 - revising care and support plans to include the client contribution in the personal budget;
 - reviewing the policy of getting care homes to collect top-ups to comply with statutory guidance.

The Council should report back to us with any changes to procedure and the outcome of the review of cases outlined above.

54. The Council has accepted all the recommendations in paragraphs 51 to 53.
55. 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 or Cabinet and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Decision

56. The Council was at fault because it failed to act in line with law and guidance when assessing the charges for Mrs D's residential care. This caused avoidable confusion and uncertainty. Mrs C would have made different decisions about her mother's care if she had received the correct information at the right time.
57. We are issuing this report because the Council has confirmed there are others in a similar position who may be similarly affected and so we consider it in the public interest to highlight this case.