Investigation of a complaint against the South Eastern Health & Social Care Trust

Report Reference: 202002527

The Northern Ireland Public Services Ombudsman
33 Wellington Place
BELFAST
BT1 6HN
Tel: 028 9023 3821
Email: nipso@nipso.org.uk
Web: www.nipso.org.uk
@NIPSO_Comms

The Role of the Ombudsman

The Northern Ireland Public Services Ombudsman (NIPSO) provides a free, independent and impartial service for investigating complaints about public service providers in Northern Ireland.

The role of the Ombudsman is set out in the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act). The Ombudsman can normally only accept a complaint after the complaints process of the public service provider has been exhausted.

The Ombudsman may investigate complaints about maladministration on the part of listed authorities, and on the merits of a decision taken by health and social care bodies, general health care providers and independent providers of health and social care. The purpose of an investigation is to ascertain if the matters alleged in the complaint properly warrant investigation and are in substance true.

Maladministration is not defined in the legislation, but is generally taken to include decisions made following improper consideration, action or inaction; delay; failure to follow procedures or the law; misleading or inaccurate statements; bias; or inadequate record keeping.

The Ombudsman must also consider whether maladministration has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. A remedy may be recommended where injustice is found as a consequence of the failings identified in a report.

Reporting in the Public Interest

This report is published pursuant to section 44 of the 2016 Act which allows the Ombudsman to publish an investigation report when it is in the public interest to do so.

The Ombudsman has taken into account the interests of the person aggrieved and other persons prior to publishing this report.

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SUMMARY

I received a complaint about how the South Eastern Health and Social Care Trust (the Trust) handled requests the complainant made to it for a determination of his mother's eligibility for continuing healthcare (CHC).[1] The complainant's mother is referred to in this report as 'the patient'.

The complainant said the Trust informed him that CHC was not available in respect of the patient. Later, the Trust told the complainant the patient's needs were being met in a care home on the basis of assessments it made. The complainant was dissatisfied with this response and brought a complaint to my office.

My investigation found that the Trust did not complete appropriate assessments of the patient's needs, before discharge from hospital and before her admission to the care home. The Trust did not determine her eligibility for CHC, in accordance with the Department of Health's policy direction and guidance that applied at the time. I found that the Trust failed to provide appropriate responses to the complainant when he asked it to assess the patient's eligibility for CHC, in that information it provided was inaccurate and misleading.

I upheld the complaint. I recommended that the Trust provide a written apology to the complainant, carries out a review of the patient's CHC eligibility and that it implements a number of service improvements.

[1] At the time the complainant submitted his complaint to my Office (April 2022), 'Continuing Healthcare' (CHC) was the term used in Northern Ireland to describe the practice of the health service meeting the cost of any social need which was driven primarily by a health need. Essentially, this meant that if an individual's primary need was for healthcare, rather than for social care (also known as personal social services), they did not have to pay for the care they received, irrespective of where that care was provided. A new policy for determining eligibility to CHC was introduced in Northern Ireland in February 2021. However, that 2021 Policy was quashed by a High Court Judicial Review judgement on 30 June 2023, citation [2023] NIKB 72. The decision is currently subject to an appeal to the Court of Appeal.

THE COMPLAINT

1. This complaint is about the actions of the South Eastern Health and Social Care Trust (the Trust). The complainant raised concerns about how the Trust arranged for the care of his mother, who is referred to in this report as 'the patient'. The complaint concerns the Trust's handling of requests the complainant made to it for a determination of the patient's eligibility for continuing healthcare (CHC).

Background

2. The patient was initially admitted to hospital in June 2020, having suffered seizures and with significant co- morbidities. She was transferred to another hospital and spent time in the Intensive Care Unit (ICU) before being transferred back to the original hospital. The hospital discharged her to an intermediate care bed in a care home in August 2020 for rehabilitation. She was readmitted to hospital a few days later with further seizures. discharged to her home in September 2020 with a package of care provision. He said he 'requested his mother was assessed for "Continuing Healthcare" (CHC) The patient had another hospital admission in April 2021 before being discharged back to the care home.

3. The complainant emailed the Trust and subsequently spoke to the senior manager of the service in September 2021 about the request for assessment for CHC.

4. On 9 November 2021, the Trust Director of Primary Care wrote to the complainant in response to his email of 17 September 2021 to the Trust. The complainant responded to the Trust by email on 19 November 2021 seeking further clarity.

5. The Trust's Assistant Director of Elderly Services, on behalf of the Chief Executive, wrote to the complainant on 14 December 2021, providing the Trust's final response to his complaint. The complainant was dissatisfied with the Trust's response and submitted his complaint to my Office.

Issue of complaint

6. I accepted the following issue of complaint for investigation:

Issue 1: Was the Trust handling of the patient's care appropriate, regarding any continuing healthcare entitlement:
a) in August and September 2020?
b) in April 2021?

INVESTIGATION METHODOLOGY

7. In order to investigate this complaint, the Investigating Officer obtained from the Trust all relevant documentation and records together with its comments on the issues the complainant had raised. The Investigating Officer also obtained the patient's social work records and notes from the Trust.

Independent Professional Advice

8. After further consideration of the issues, I obtained independent professional advice from the following independent professional advisor (IPA):

- a Registered Nurse with 40 years' experience, including 20 years' experience within NHS Continuing Healthcare.

9. The IPA provided me with 'advice'. How I weighed this advice, within the context of this particular complaint, is a matter for my discretion.

Relevant Standards and Guidance

10. In order to investigate complaints, I must establish a clear understanding of the standards, both of general application and those which are specific to the circumstances of the case. I also refer to relevant regulatory, professional and statutory guidance.

11. The general standards are the Ombudsman's Principles:[2]

(i) The Principles of Good Administration

[2] These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association.

These Principles are reproduced in Appendix One to this report.

12. The specific standards and guidance are those which applied at the time the events complained of occurred. These governed the exercise of the administrative functions of the organisation and professional judgement of the individuals whose actions are the subject of this complaint.

13. The specific standards relevant to this complaint are:

    (i) The Health and Personal Social Services (NI) Order 1972 ('the 1972 Order');

    (ii) Circular HSC (ECCU) 1/2010 Care Management, Provision of Services and Charging Guidance; issued by the (then) Department of Health, Social Services and Public Safety on 11 March 2010 ('the 2010 Circular);

    (iii) Circular ECCU1/2006, HPSS Payments for Nursing Care in Nursing Homes, issued by the issued by the (then) Department of Health, Social Services and Public Safety on 10 March 2006 ('the 2006 Circular'); and

    (iv) Circular HSC (ECCU) 1/2021 – Continuing Healthcare in Northern Ireland: Introducing a fair and transparent system, issued by the Department of Health on 12 May 2021 ('the 2021 Circular').

14. I did not include in this report all information I obtained in the course of the investigation. However, I am satisfied that in reaching my findings, I took into account everything I consider relevant and important.

15. A draft copy of this of this report was shared with the complainant and the Trust whose actions are the subject of the complaint, to enable them to comment on its factual accuracy and the reasonableness of my proposed findings and recommendations.

THE INVESTIGATION

Context of CHC in Northern Ireland

16. The provisions around CHC in Northern Ireland are complex and have been subject to change by the Department of Health in recent years.

17. Before I set out my further investigation findings, I should highlight that in February 2021, the Department of Health published the outcome of a public consultation it launched in June 2017 on future arrangements for CHC in Northern Ireland. Later, in May 2022, the Department issued guidance[3] on a new policy for determining CHC eligibility. The introduction of this new policy means eligibility for CHC is now based on the application of a single eligibility criterion.

18. The new single CHC eligibility criterion is whether an individual's care needs can be properly met in any setting other than a hospital. If the answer to this question is 'yes', then the individual will not be eligible for CHC and will be subject to the relevant charging policy for the care they receive. The 2021 Circular advised that the new policy, which represented an update to paragraphs 17 and 88 (only) of the 2010 Circular, came into effect from 11 February 2021 and that any applications for CHC already received prior to that date were to be assessed in line with previous guidance or policies.

19. Prior to 11 February 2021 the Department of Health policy that applied was the 2010 circular which provided for the distinction between 'healthcare' and 'personal social services'. The circular and guidance also provided a comprehensive assessment of patient need.

20. It is important to highlight that the new single eligibility criterion policy came into effect on 11 February 2021, so it did not apply during the entirety of the period my investigation examined. Indeed, that policy was quashed by the High Court in Northern Ireland in a Judicial Review decision issued on 30 June 2023 citation no. [2023] NIKB 72. The High Court judgement also made comment on

[3] Circular HSC (ECCU) 1/2021 – Continuing Healthcare in Northern Ireland: Introducing a fair and transparent system ('the 2021 Circular')

the policy framework in relation to CHC in Northern Ireland and that it was available in settings other than hospitals including care homes.[4] The Judicial Review decision is currently being appealed.

21. I have considered the judgement as referring to the legal position which is clearly outside my jurisdiction. I am investigating a complaint around how the Trust applied the policy, circular and guidance which was in force at the time. I accept and the complainant is aware that changes to the legal position in the future will determine and direct future actions of the Trust.

22. The request for CHC in this case pre-dated the 2021 policy, if I accept that the complainant requested information and was told 'no such CHC system was available in Northern Ireland'. In reality, I do not need to make a finding on that point as the Trust made clear in its later communications that in applying the 2021 policy it would reassess eligibility for CHC from August 2020 according to the policy in place at the time – the 2010 circular. Where the difference may be relevant is in any distinction between the 2010 circular and the 2021 circular in practical application. My findings do not make any determination of the eligibility of the patient for CHC.

23. In considering this complaint, I am mindful that the 1972 Order (the main legislation governing the provision of health and social care services in Northern Ireland) does not provide an explicit statutory framework for the provision of CHC, nor does it expressly require that CHC be provided to people in Northern Ireland.

24. I am aware that the 2010 Circular (which sets out the Department of Health's guidance on charging for social care (also known as 'personal social services') provided in…care homes and nursing homes) states at paragraph 63, *'[The 1972 Order] requires that a person is charged for personal social services provided in… or nursing home accommodation arranged by a [Health and Social Care] Trust.* ***There is no such requirement, or authority, to charge for healthcare provided in the community, either in the service user's own***

[4] The Judicial Review on 30 June 2023 citation no. [2023] NIKB 72 examined the impact and delivery of the 2021 policy.

home or in a… care or nursing home' (the 2010 Circular's emphasis). This means there is a clear, and important, difference between healthcare and social care, in terms of an HSC Trust's legal authority to charge for the care provided to an individual who has moved into a care or nursing home.

25. The significance of the distinction between healthcare and social care was reinforced by the (then) Minister of Health when he responded in September 2013 to a Northern Ireland Assembly Question[5] about CHC. The Minister stated, *'… an individual's primary need can either be for health care – which is provided free – or for social care for which a means tested contribution may be required.'*

26. Given the significance of the distinction between healthcare and social care, in relation to a HSC Trust's authority to apply charges for the care an individual receives, I highlight the advice I obtained from the IPA on the difference between both concepts.

27. For the sake of clarity, I should also highlight the difference between social care and nursing care. This difference is important because the 2006 Circular (paragraph 2) explains that HSC Trusts are responsible 'for paying the cost of nursing care of patients who otherwise pay the full cost of their nursing home care.'

28. The existence of CHC in Northern Ireland was made clear in the Department of Health's 2017 public consultation on future arrangements for CHC. The Department's consultation document explained the term 'continuing healthcare' describes the practice of the health service meeting the cost of any social need which is driven primarily by a health need. Specifically, it stated, 'At present, if the outcome of an assessment [of an individual's needs] indicates a primary need for healthcare, then the HSC is responsible for funding the complete package of care in whatever setting. This is what is known as continuing healthcare in the local context. Alternatively a primary need for social care may

[5] Assembly Question AQW 25318/11-15

be identified and where such a need is met in a … nursing home setting, legislation requires the HSC Trusts to levy a means-tested charge.' The existence of CHC in Northern Ireland was further reinforced in the High Court Judgment published on 30 June 2023 as referenced above.

Issue: Was the Trust handling of the patient's care appropriate, regarding any continuing healthcare entitlement

a) in August and September 2020?

b) in April 2021

Detail of complaint

29. The complainant said that the patient had suffered a stroke, was incapacitated and had co-morbidities. The patient was initially admitted to hospital in June 2020. She was transferred to another hospital and spent time in the Intensive Care Unit (ICU) before being transferred back to the original hospital. The patient was discharged from hospital to an intermediate care bed in August 2020. She was re-admitted to hospital a few days later. The patient was discharged to her home in September 2020 with a package of care provision. He said he *'requested his mother was assessed for "Continuing Healthcare"*. The complainant said, *'he was informed by a social worker that no such service (CHC) exists'*. The patient had another hospital admission in April 2021 before being discharged to a care home.

30. The complainant also said that despite further requests to the Trust, the Trust confirmed the patient was not eligible for CHC.

31. The complainant said the Trust's actions meant that the patient was not properly assessed for CHC, that information provided by the Trust was unclear, inaccurate and misleading. The patient is being charged for care on an ongoing basis.

Evidence Considered

Legislation, Policies and Guidance

32. I considered the following legislation, policies and guidance:

- The 1972 Order;
- The 2010 Circular;
- The 2006 Circular; and
- The 2021 Circular.

33. Relevant extracts of the legislation, policies and guidance I considered are at Appendix Two to this report.

The Trust's response to investigation enquiries

34. I made written enquiries to the Trust about the issues the complainant raised. Relevant extracts of the Trust's response to my enquiries are at Appendix Three to this report.

Documentation and records examined

35. I completed a review of the copy documentation the Trust provided in response to my investigation enquiries. The documentation I examined included records relating to the assessment of the patient's needs prior to her discharge from hospital to the care home; records relating to reviews of the patient's needs that were completed while she was a patient in the Hospital, in the rehabilitation placement and discharge home with a care package.

Independent Professional Advice

36. I considered the advice I obtained from the IPA. This advice concerned the assessment of the patient's eligibility for CHC in the period August 2020 to April 2021.

37. The IPA's full advice report is at Appendix Four to this report.

Analysis and Findings

38. I note that when the complainant emailed the Trust on 17 September 2021, he referred to the patient as being '*gravely ill and incapacitated as a result of a*

stroke'. He also highlighted having made a request for CHC verbally in August 2020. I note there is no written record of this request. In this email he made a formal request for an assessment of the patient's eligibility for CHC.

39. The IPA highlighted, *'the Trust stated 'Given the assessment recommendations, a continuing healthcare assessment was not undertaken in respect of your mother' and 'there was no charge'. The Trust's response was appropriate in respect to the August 2020 discharge to [the Nursing Home] for a period of rehabilitation. The aims of this placement were to 'maximise independence in cognitive integration skills, functional transfers/mobility, personal care tasks, toileting, and meds' (Occupational Therapy Specialist Summary dated 07 August 2020). This is because the intermediate care placement was being funded by the Trust whilst the patient's potential for rehabilitation was being assessed. Following the period of rehabilitation an assessment to determine the patient's eligibility for Continuing Healthcare would be appropriate as the patient's long-term health and personal care needs would then be more apparent.'* I accept the IPA's advice. An assessment of the patient's health and personal care needs was warranted.

August and September 2020

40. I note the IPA advised in relation to whether there had been appropriate assessment of the patient, '***August 2020 No***:…*To be in accordance with the NISAT Procedural Guidance (Sept 2017) a Complex NISAT assessment should have been undertaken at this point as the assessments identified a potential need for rehabilitation and change in domicile*'. I also note the IPA advised, '***September 2020 No****:…To be in accordance with the NISAT Procedural Guidance (Sept 2017) a Complex NISAT assessment should have been undertaken at this point as the assessments identified a potential need for a substantial domiciliary care support care package.' This level of assessment was inadequate to fully inform where the patient's needs would be best met.'*

41. It is my view that the position the Trust conveyed to the complainant in its letter of 14 December 2021 was inaccurate, and contrary to the policy direction set out in the 2010 Circular. This is because the Trust's letter to the complainant

implied because the patient went to an intermediate rehabilitation placement bed and then home, on discharge from hospital, she could not be eligible for CHC.

April 2021

42. The IPA advised, *'**April 2021 No**: The assessment to support the patient's discharge to a nursing home was an initial NISAT assessment and updated Transition Plan for Care and Support dated 03 August 2020.*
An Initial NISAT assessment was completed dated 27 April 2021. This document, completed by a social worker, mentions MDT assessment but contains no detail of those assessments and sections of the document have not been completed including any specific risk factors at that time.
The assessor, after outlining the events leading up to the hospital admission and discussions with her son then describes a basic overview of the patient's need. This states 'Following MDT assessment (the patient) is currently receiving care in bed. MDT has recommended that (the patient) requires assistance and supervision of two people with personal care and toileting. MDT also advised that (the patient) is dependent for meals and medication. (the patient) requires assistance, encouragement and prompt when eating and requires assistance with medications. Following assessment and consultation with (the patient's) son it is agreed that it is in her best interest to be discharged from hospital to a nursing home placement'.

43. The IPA also advised, '*The patient's circumstances i.e. requiring a substantial care package to return home, should trigger an onward referral for further assessment. This requirement is set out within the NISAT Procedural Guidance (Sept 2017) Page 70. which states 'Progress to Complex Assessment - Where the person requires short or long-term intensive input from services, support to remain at home, or a potential change in domicile, the Complex Assessment should be completed'.* The IPA advice continued, 'Without continuing with the NISAT assessment process as set out within Circular HSC (ECCU) 1/2010 and NISAT Procedural Guidance (Sept 2017) there was not a sufficient level of assessment to fully inform the decision regarding the setting in which the patient's needs would be best met'.

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44. I am satisfied that the assessments completed by the Trust were not appropriately robust and were insufficient to inform the determination of patient's primary needs and, therefore, any eligibility for CHC. However, contrary to the Trust's position at that time, which was that a decision on the patient's CHC eligibility had been taken following the outcome of these assessments, my investigation found no evidence of any determination of the nature of the Trust's decision regarding the patient's primary needs and, consequently, her eligibility for CHC, having been made by that time.

45. I referred earlier to the Principles of Good Administration being the standards against which the administrative actions of public bodies are to be judged. These principles (which are reproduced at Appendix One to this report) require public bodies to get it right; be customer focused; be open and accountable; act fairly and proportionately; put things right; and seek continuous improvement.

46. The First Principle of Good Administration, 'Getting it right', requires a public service provider to act in accordance with the law, policy and guidance. The Third Principle, 'Being open and accountable' requires a public body to be open and clear about policies and procedures, and to ensure that information it provides is accurate and complete. The failings I highlighted above indicate that in its handling of the complainant's requests for a determination of the patient's eligibility for CHC, the Trust did not meet the standards required by these Principles. I consider this to be maladministration on the part of the Trust.

47. I am satisfied this maladministration caused the complainant to experience the injustice of frustration and uncertainty. In addition, I consider the complainant had a reasonable expectation that the Trust would deal appropriately with his request for the patient's eligibility for CHC to be assessed, in accordance with the policy that applied at the time. My investigation established this expectation was not met.

48. I am conscious that the IPA, based her advice to me after a detailed examination of the patient's records, as provided by the Trust. While I note this advice, it is based on a retrospective review of the records and without the

appropriate involvement of the patient and her family in a formal process for determination. I also note the lack of a clear framework such as the national framework for CHC assessment in England, to aid the decision making of the Trust, which is a point made by the High Court in its recent judgement of 30 June 2023. Given this, I do not make any determination on whether the patient was eligible for CHC in August and September 2020, nor at the time of her admission to a nursing home in April 2021

49. However, I note the Trust has indicated that they are willing to undertake a review of the patient's entitlement to CHC. I welcome this and have referenced this offer of a review within my recommendations.

50. Having found maladministration on the part of the Trust in relation to its handling of the complainant's requests for the patient's eligibility for CHC to be determined, and being satisfied that this maladministration caused the complainant to sustain injustice, I uphold this complaint.

51. In commenting on the draft of this report, the Trust said '*The landscape regarding CHC is confusing in the absence of clear…guidance…The Trust does not agree that the assessments completed were not appropriately robust. Trusts do not have a specific CHC assessment tool to assist with determining a service user's primary need…Any "failings" found during this investigation indicates the challenges and difficulties Trusts are facing in terms of CHC, and does not reflect the commitment of staff to service users and carers/NOK.'*

CONCLUSION

52. I received a complaint about how the Trust handled requests by the complainant on behalf of the patient for her eligibility for CHC to be determined.

53. My investigation found that appropriate assessments of the patient's needs were not completed both before and following her discharge from hospital and eventual placement in a care home in April 2021. The Trust failed to determine the nature of the patient's need and the appropriate setting for her needs and

therefore her eligibility for CHC, in accordance with the Department of Health's policy, directions and guidance.

54. I also found the Trust failed to provide appropriate responses to the complainant's requests for a determination of the patient's eligibility for CHC. Rather, the Trust relied on its position that because assessments of the patient's needs indicated she could receive the care she required at home or in a care home setting, it followed she could not be eligible for CHC. The Trust did not provide evidence of an appropriate determination of the patient's eligibility for CHC.

55. I consider the Trust's failure to assess and determine the nature of the patient's primary need, in accordance with the policy that applied at the time, and to respond appropriately to the complainant's requests about eligibility for CHC, is maladministration. I am satisfied this maladministration caused the complainant to experience the injustice of frustration, uncertainty and the loss of opportunity to have his requests for assessments of the patient's CHC eligibility dealt with appropriately. I uphold this complaint.

Recommendations

56. I recommend that within one month of the date of this report, the Trust provides the complainant with a written apology, made in accordance with NIPSO's 'Guidance on issuing an apology'[6] for the injustice caused as a result of the failings identified in this report.

57. I also recommend that the Trust implements the following service improvements:

    (i) the learning points highlighted in this report should be communicated to relevant Trust staff;

    (ii) the Trust should take action to ensure that it has in place the necessary framework to enable it to consider all requests for assessment of CHC eligibility in a timely, consistent and transparent manner, and in accordance with the Department of Health's policy direction, as set out in

[6] NIPSO-Guidance-on-issuing-an-apology-July-2019.pdf

the 2010 Circular and in doing so, the Trust will clearly need to consider the judgement of the High Court [2023] NIKB 72 and any appeal decision;

(iii) Once such a framework is established the Trust, in accordance with its offer to conduct a review of the patient's case, should then review this case and make a determination on the patient's eligibility for CHC.

(iv) The Trust should provide guidance to relevant Trust staff to assist them in handling requests for assessments of CHC eligibility.

58. I recommend that the Trust implement an action plan to incorporate these service improvement recommendations and that it provide me with an update within six months of the date of this report. The update should be supported by evidence to confirm that appropriate action has been taken.

Margaret Kelly
Ombudsman

April 2024

Appendix One

Principles of Good Administration

Good administration by public service providers means:

1. Getting it right

- Acting in accordance with the law and with regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

4. Acting fairly and proportionately

- Treating people impartially, with respect and courtesy.

- Treating people without unlawful discrimination or prejudice and ensuring no conflict of interests.

- Dealing with people and issues objectively and consistently.

- Ensuring that decisions and actions are proportionate, appropriate and fair.

5. Putting things right

- Acknowledging mistakes and apologising where appropriate.

- Putting mistakes right quickly and effectively.

- Providing clear and timely information on how and when to appeal or complain.

- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

6. Seeking continuous improvement

- Reviewing policies and procedures regularly to ensure they are effective.

- Asking for feedback and using it to improve services and performance.

- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.