

You can contact me on: [REDACTED]

Our reference: [REDACTED]

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**Parliamentary and Health Service
Ombudsman**

[REDACTED]

11 April 2014

Dear Mr [REDACTED]

Your complaint about NHS England

We have now completed our investigation into your complaint and I enclose our final report. A copy of this report has also been sent to NHS England.

Thank you for your comments. As confirmed in our report, and as discussed previously, we do not make decisions about eligibility itself but consider the reasonableness of the process followed. We are satisfied that the IRP considered the key clinical facts, considered appropriate evidence, appropriately applied the relevant eligibility tests and provided a robust rationale for its decision.

It is clear that you provided a written submission to the IRP and you also made a verbal statement at the IRP meeting. You may feel that you were not allowed to make a full statement but we have found nothing to suggest this.

With regard to whether your mother should have been assessed in hospital before her discharge in 1998, this would not usually fall within the remit of the IRP to consider. This would also be outside of our usual time limits to consider as a separate issue. However, in any event, the information looked at to consider eligibility went back as far as 1996 to highlight the diagnosis of dementia and the point at which the mental health team withdrew. Therefore evidence about Ms [REDACTED]' condition at this early stage had been noted by the IRP.

We have considered your comments but, whilst we understand your strength of feeling regarding your complaint, they are not enough to make us reconsider our decision

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There are legal restrictions on disclosing information that we share. This means that any information or documents we give to a complainant cannot be shared or made public. However restrictions on disclosure do not apply to the final report.

If you think our decision is wrong, you can request a review. To enable us to review our decision you must provide us with evidence that our decision was based on inaccurate information; or you have new information that was not previously available to us; or we overlooked or misunderstood your complaint.

To request a review, you can complete a '*What to do if you think our decision is wrong*' form, which is available on our website: www.ombudsman.org.uk. Alternatively, you can contact us for the form. You will need to show that you meet our review criteria **within three months** of the date of this letter.

Yours sincerely

 Investigator

Enc: Final report

PHSO Customer Survey

An independent research company acting on our behalf may contact you in the future in connection with surveys or research to help us improve our services. If you would prefer not to take part, please let us know within 14 days of the date of this letter by calling 0300 061 4222 (24 hour answerphone) or by emailing us at customersurvey@ombudsman.org.uk. Information passed to and collected by the research company is kept in the strictest confidence, and used for research purposes only.

We sometimes publish case summaries and include them on our website. These summaries do not include the names of people who have complained to us. We might choose to publish a summary of your case. If you have any objections to us doing so, please let me know.

HS-176431**INVESTIGATION REPORT Introduction**

1. This is our report setting out the findings of our investigation into Mr Xxxxxxxx' complaint about NHS England.
2. Mr ██████████ complained to us about the determination that his mother, Ms Agnes ██████████, was not eligible for continuing healthcare funding for the period of 4 September 1998 to 6 November 2002.

Our decision

3. To investigate this complaint we considered:
 - Information provided by Mr ██████████;
 - Information provided by NHS England (including the documentation considered by the IRP);
 - Clinical Advice from a Continuing Healthcare adviser (our adviser); and
 - Norfolk, Suffolk and Cambridgeshire SHA criteria
 - The National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care, revised November 2012 (the National Framework).
4. We have decided not to uphold Mr ██████████' complaint because we have found that the Independent Review Panel (IRP) properly followed the process outlined in the local criteria and the National Framework.

Background

5. Ms ██████████ had a history of dementia. In May 1998 she was admitted to hospital with confusion and disorientation. On admission she was found to be suffering from bowel cancer which was successfully operated on. In August 1998 Ms ██████████ was moved to a hospital for rehabilitation before being admitted to a residential home in September 1998. Sadly Ms ██████████ died in November 2002.
6. In October 2004 Mr ██████████ asked that his mother's case should be considered for NHS Continuing Healthcare funding. They asked for some more information. It appears that, although Mr ██████████ replied, the SHA did not receive anything and closed the case.
7. In 2009 Mr ██████████ contacted them again and after an exchange of correspondence his request was accepted. NHS Suffolk Retrospective Healthcare Panel considered the case in May 2012. It decided that Ms ██████████ was not eligible for 100% funded NHS Continuing Healthcare.

8. In April 2013 Mr ██████ requested a review. An IRP meeting in August 2013 concluded that Ms ██████ was not eligible for continuing healthcare funding with regard to Norfolk, Suffolk and Cambridgeshire SHA criteria. The IRP upheld the decision of the Retrospective Healthcare Panel.

What we think about Mr ██████' complaint

9. In complaints regarding decisions about eligibility for NHS Continuing Healthcare funding, we do not make decisions about eligibility itself but instead consider the reasonableness of the process followed. As long as the evidence indicates that a reasonable process has been followed in accordance with Department of Health Guidelines, there is generally no basis on which we can question the final decision made. In this case, it was our role therefore to decide whether the Independent Review Panel (IRP) had considered the decision that Ms ██████ was not eligible for NHS Continuing Healthcare funding in line with the local criteria in place at that time. However we are mindful that the IRP said that it also used the Decision Support Tool in the National Framework to ensure that all of Ms ██████' needs had been considered.

10. First we looked at whether the panel was properly constituted. The guidelines say that a panel should have access to independent clinical advice and expect that there will be representatives from both the Local Authority and the NHS. Ms ██████' case was considered by an IRP consisting of an Independent Chair, a Local Authority representative and a PCT representative. There was also a clinical adviser available to the panel for advice. Therefore in this case the panel was properly constituted and met the criteria laid down in the guidelines.

11. An IRP should have sufficient clinical information, as well as evidence from family/representatives, to reach an informed decision. The IRP had access to a wide range of evidence including care home records, social services records, mental health records, assessments and information from the family. Mr ██████ attended the meeting and submitted a statement detailing his views and this was considered by IRP. The inclusion of Ms ██████' family in the review process was well documented and in line with best practice.

12. Our clinical adviser said that from the documentation she has seen it appears that all the relevant clinical facts were established with no obvious omissions. We are therefore satisfied that there was adequate information available to enable the IRP to reach a robust decision.

13. We also noted that during the IRP process there was a clinically-led discussion of the impact and interaction of Ms ██████ care needs.

14. There is evidence in the IRP notes that they discussed the nature, complexity, intensity and unpredictability of Ms ██████' needs in a reasonable clinically-led manner.

15. Of course, the issue at the heart of the complaint is that Mr ██████ believes the IRP reached the wrong decision based on the available evidence. So we have given that some thought.

16. Our adviser said that Ms [REDACTED] had a range of health and social care needs. She had severe cognitive impairment which affected her ability to communicate and her behaviour. In addition her mobility was poor, she was doubly incontinent and needed help to safely maintain adequate nutritional intake. She was dependent on carers to meet her everyday needs with regard to activities of living and maintenance in a safe environment. Our adviser said that Ms [REDACTED]' needs warranted a clinical discussion and for a professional judgement to be made based on this clinical evidence. Our adviser said that this type of judgement is not an exact science but it is essential that the decision is justified and reasonable.

17. The levels of needs described fit appropriately into the descriptors in the Decision Support Tool that have been allocated by the IRP. We are satisfied that the criteria for NHS Continuing Healthcare eligibility have been appropriately applied to the identified needs for Ms Xxxxxxxx. Our adviser added that the Norfolk, Suffolk and Cambridgeshire SHA eligibility criteria for people with dementia, and people with physical and/or sensory disability, had been applied.

18. Our adviser said that no evidence was found that Ms [REDACTED]' care was difficult to implement or required an increased skill level.

19. Overall we are satisfied that there is adequate evidence that an appropriate clinically-led discussion of the impact and interactions of the relevant key clinical facts had taken place to inform the decision.

20. The decision that Ms [REDACTED] did not have a primary health need during the period under review seems to be justified by the available evidence. The review has been undertaken in an acceptable manner and the decision was properly reached in accordance with the local criteria and the National Framework.

21. Our adviser is satisfied that the overall decision on Ms [REDACTED]' eligibility was a reasonable one and that it was reached in line with national guidance. The evidence suggests to us that the IRP appropriately discussed Ms [REDACTED]' primary need. We think the panel's notes provided a reasonable justification for why Ms [REDACTED] did not have a primary need for health care. For that reason, we are satisfied that the decision reached by the IRP was justified and that it was supported by the clinical evidence.

22. Eligibility for continuing healthcare funding is based on the quantity and/or quality of care needs bearing in mind the nature, complexity, intensity or unpredictability of those needs and whether a primary need for health care exists. Mr [REDACTED] believes that the NHS should have been fully responsible for his mother's care package because all of her needs arose from 'a *cranial illness*'. He said that he cannot understand why she was not eligible. Even if a person needs 24 hour care, this does not in itself indicate eligibility. Whilst the IRP identified that Ms [REDACTED] had a range of needs and needed a lot of help, it found that her healthcare needs were routine and secondary to her need for personal and social care and the provision of a safe environment. We have seen no evidence to suggest that the IRP failed to follow the appropriate process in reaching that conclusion, or that the conclusion itself was unreasonable.

Our conclusions

23. In summary, having considered all the available information, including the evidence submitted to the IRP in relation to Ms [REDACTED] case, we consider that the IRP acted reasonably and appropriately in accordance with the local criteria in place at that time. The IRP considered the key clinical facts, considered appropriate evidence, appropriately applied the relevant eligibility tests and provided a robust rationale for its decision.

26. Mr [REDACTED] said that eligibility criteria has no relevance to '*the Coughlan judgement*'. Our adviser said that case law compliance has been embedded in the National Framework. Therefore if a case adheres to the principles in the National Framework then effectively it is considered to have been in accordance with case law. In this case, as well as the appropriate local criteria, the Decision Support Tool from the National Framework was used to ensure that all of Ms [REDACTED] needs were considered.

27. Our adviser said that there is good evidence that the key determinants of eligibility (nature, complexity, intensity and unpredictability) were applied to those needs and the primary need test applied. The lawful limits of local authority responsibility were considered. Therefore there is nothing to suggest that this case was not Coughlan compliant.

27. Our adviser said that it is not as simple as comparing an individual's needs to those of Ms Coughlan. The Coughlan case was primarily to do with care and was also concerned with the health authority's promise of a '*home for life*'. However the Appeal Court laid down the '*primary need test*' as outlined in the current National Framework to determine whether a person is entitled to fully funded NHS care.

28. The judgment was that it was unlawful at that time for the health authority to transfer responsibility for her nursing services onto social services as her care was found to be beyond the lawful limits of social services' provision. Since then the NHS in 2001 introduced payments to nursing homes for a person's nursing care and no person now pays for nursing care in a care home if it is assessed as being needed. The judgment clarified the law on the nursing care that can lawfully be provided by local authorities and the national guidance also covers this which should be considered by panels.

29. Criteria for funding has been laid down since the Coughlan judgement in Department of Health guidance. The '*primary need for healthcare*' principle applies in NHS Continuing Healthcare funding eligibility decisions, and the National Framework and Decision Support Tool provide clear guidance on how this should be applied in practice. Every person is assessed individually. Therefore a simple comparison of a person's need with the Coughlan case is not the test of eligibility.

30. We have seen no evidence of any failings by NHS England and therefore we do not uphold Mr [REDACTED] complaint.

[REDACTED] Investigator

11 April 2014