

## **The Ombudsman's final decision**

Summary: There was fault in the way the Council made decisions about Mr N's and Mr O's future respite care. This caused them and their mother Ms M avoidable uncertainty and distress. To remedy the injustice the Council has agreed to apologise, carry out further reviews and a mental capacity assessment and make a payment to reflect the loss of respite care during the period of closure. This action is an appropriate remedy for the injustice caused.

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## **The complaint**

1. Ms M and other carers complain about Southampton City Council's (the Council's) offer of respite care following the closure of Kentish Road, a care home providing respite care for adults with learning disabilities. They say they were not properly consulted about the proposed alternatives and consider these unsuitable
2. They also complain about the decision-making which led to Kentish Road's closure.
3. Ms M seeks a payment for her losses and wants the Council to re-open Kentish Road.

## **What I have investigated**

4. I have investigated the complaint at paragraph 1. My reasons for stopping investigating the complaint at paragraph 2 are at the end of this statement.

## **The Ombudsman's role and powers**

5. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I 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*)
6. We have the power to start or discontinue an investigation into a complaint within our jurisdiction. (*Local Government Act 1974, sections 24A(6), as amended*)
7. The Court of Appeal said our powers to decline to investigate a complaint (or to discontinue an investigation) are wide and that it will be '*clearly right that the Ombudsman must prioritise complaints which appear to him to involve significant injustice as opposed to those which do not*' (*R(Abernathy) v LGO [2002] EWCA Civ 552*)

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8. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

## **How I considered this complaint**

9. I considered the complaint, the Council's response to my enquiries and documents described later in this statement. Both parties had a chance to comment on a draft of this statement and I took any comments into account.

## **What I found**

### **Relevant law and guidance**

10. Respite care is a service to give a carer time away from caring for an adult with care and support needs. Councils provide respite care for adults with disabilities under the legal framework described in the following paragraphs.
11. A council must carry out an assessment for any adult with an appearance of need for care and support. The assessment must be of the adult's needs and how they impact on their wellbeing and the outcomes they want to achieve. It must also involve the individual and where appropriate their carer or any other person they might want involved. (*Care Act 2014, section 9*)
12. Statutory guidance requires a council to carry out an assessment over a suitable and reasonable timescale considering the urgency of needs and any variation in those needs. Local authorities should tell the individual when their assessment will take place and keep the person informed throughout the assessment. (*Care and Support Statutory Guidance, paragraph 6.29*)
13. The Care Act spells out the duty to meet eligible needs (needs which meet the eligibility criteria). (*Care Act 2014, section 18*)
14. An adult's needs meet the eligibility criteria if they arise from or are related to a physical or mental impairment or illness and as a result the adult cannot achieve two or more of the following outcomes and as a result there is or is likely to be a significant impact on well-being:
- Managing and maintaining nutrition
  - Maintaining personal hygiene
  - Managing toilet needs
  - Being appropriately clothed
  - Making use of the home safely
  - Maintaining a habitable home environment
  - Accessing work, training, education
  - Making use of facilities or services in the community
  - Carrying out caring responsibilities.
- (Care and Support (Eligibility Criteria) Regulations 2014, Regulation 2)*
15. The Care Act explains the different ways a council can meet eligible needs by giving examples of services it may provide including: accommodation in a care home, care and support at home (such as outreach support), counselling and social work and information advice and advocacy. (*Care Act 2014, section 8*)

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16. If a council decides a person is eligible for care, it should prepare a care and support plan which specifies the needs identified in the assessment, says whether and to what extent the needs meet the eligibility criteria and specifies the needs the council is going to meet and how this will be done. It should set out the cost of care in a personal budget. The council should give a copy of the care and support plan to the person. (*Care Act 2014, sections 24 and 25*)
  17. Statutory Guidance explains a council should review a care and support plan at least every year, upon request or in response to a change in circumstances. (*Care and Support Statutory Guidance, Paragraph 13.32*)
  18. A council should revise a care and support plan where circumstances have changed in a way that affects the care and support plan. Where there is a proposal to change how to meet eligible needs, a council should take all reasonable steps to reach agreement with the adult concerned about how to meet those needs. (*Care Act 2014, sections 27(4) and (5)*)
  19. Statutory guidance is silent about timescales for the completion of care and support plans and/or reviews of the same. In the absence of a legal timescale, we expect a council to act in a timely manner and to provide a copy of a care plan or review within a reasonable timescale after completing it.
  20. The High Court said an individual's wishes are not the same as their needs and wishes are not the paramount consideration. A council has to have 'due regard' to an adult's wishes as a starting point, but social workers are entitled to exercise their professional skills and judgement in deciding how to meet eligible needs. (*R (Davey) v Oxfordshire County Council [2017] EWHC 354 (Admin)*)
  21. A council must carry out a carer's assessment where it appears a carer may have needs for support. The assessment must include an assessment of the carer's ability and willingness to continue in the caring role, the outcomes the carer wishes to achieve in daily life and whether support could contribute to achieving those outcomes (*Care Act 2014, section 10*)
  22. The Act makes clear that the local authority is able to meet the carer's needs by providing a service directly to the adult needing care. The carer must still receive a support plan which covers their needs, and how they will be met. (*Care and Support Statutory Guidance 2014*)
  23. When carrying out needs assessments and preparing and revising care and support plans, councils should arrange an independent advocate for a person who has substantial difficulty in understanding, retaining, weighing up information and communicating their wishes and feelings. There is no need for an advocate if the council is satisfied there is an appropriate person (who must not be a paid carer) who could support the person's involvement. (*Care Act 2014, section 67*)
  24. The legal framework for adults who lack mental capacity to make decisions is in the Mental Capacity Act 2005. If a professional considers a person lacks mental capacity to decide on their care arrangements, then the professional should carry out or arrange for an assessment of the person's capacity. If that assessment concludes the person lacks mental capacity to decide on their care or living arrangements, then the decision-maker should involve relatives and other professionals before making a decision in the person's best interests. If agreement cannot be reached about a person's best interests, then the Court of Protection can make welfare orders.

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## What happened

### Background

25. Kentish Road is a council-run residential care home providing respite care for up to eight adults with learning disabilities. Consultation about a proposal to close it started in 2014, with a decision to close taken in 2015. The decision was unpopular with carers and the subject of local media interest and a campaign.
26. Papers for a meeting of the Council's overview and scrutiny committee in September 2017 indicate the Council expected to save £300,000 a year from the closure and provision of alternative respite care.
27. In October 2017, the Council wrote to all carers explaining Kentish Road was staying open until the end of November, pending further consideration by members. Members elected to close the unit and this happened at the beginning of December.
28. Weston Court is a three-bed respite service for adults with learning disabilities. The Council commissioned it for respite care when Kentish Road closed. Weston Court is managed by an independent care provider. It has one member of staff during the day and a sleep-in support worker at night. Waking night support and one to one support are available when required. The respite service is part of a larger care home with shared facilities including a laundry, garden and lounges. The Council offered Weston Court as one of several options for respite to those who have complained to us. Other possibilities for respite care included:
  - Shared Lives which is housing and support provided in the family homes of trained and experienced carers;
  - U care home which is an established respite unit. Unfortunately, U care home did not have enough places to accept all of the people who had been using Kentish Road for respite and it was not suitable for many of the Kentish Road clients;
  - Direct payments and outreach support.
29. The Council declined to investigate any complaints about the closure of Kentish Road and so eight carers complained to us. Soon after we received the complaint, the Council decided to re-open Kentish Road. It has been open since July 2018 at weekends for respite care. The Council had also commissioned an independent review of the closure by the time the complainants came to us. The report of that review came out shortly after the complaint to us. The complainants asked us to continue with our investigation.
30. The independent review was an internal report for senior officers and members to learn lessons and improve practice for future service change and was not for sharing with members of the public. It concluded:
  - At the time of the original decision in 2015, people did not have up to date care and support plans and annual reviews had not taken place. And, there were no assessments of the mental capacity of clients to make decisions around their care and support. Transition planning was delayed or limited because carers rejected alternative provision;
  - Delays in completing needs assessments meant there was no information available to commissioners to identify and procure suitable alternative provision and this prevented a strategic approach to commissioning;

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- Consultation on the original decision was not specific enough, did not identify a range of alternatives and there may have been an element of predetermination;
  - Communication with disabled people and their carers was poor. The lack of engagement caused distress. There was real concern from carers about there being no (or at least not enough) alternative provision in Southampton, other than one unit.
31. The Council's position is:
- While the subsequent decision in 2017 remedied many of the process flaws identified in the earlier decision, the report recommended changes to similar projects in future, to avoid the risk of recurrence. It accepts the report's findings and has outlined a skeleton action plan. Some changes have already been implemented;
  - It decided to reopen Kentish Road due to feedback from carers about its value and to offer additional choice. It considered there was more than enough respite care for those who needed it (in fact, there would be an oversupply) The Council intended to run Kentish Road at weekends and it reopened at the beginning of July 2018;
  - It accepted the decision to close Kentish Road created uncertainty for carers and adults.
32. I asked the Council how it intended to allocate respite at Kentish Road as there would likely be a high demand for the service at first. The Council said it would prioritise carers who had not received any respite since the closure. For those who had received respite care at other centres, it was considering individually whether it was in their best interests to move back to Kentish Road.
- Ms M, Mr N and Mr O.**
33. Mrs M lives with her two adult sons who have learning disabilities, Mr N and Mr O. Both have eligible needs and receive care and support services from the Council including day services and support to attend a gym. They attended Kentish Road for respite care before its closure.
34. A carer's assessment for Ms M in 2015 said she was the sole carer for Mr N and Mr O. It said she wanted some time to herself so she could have a break from caring. The Council's records suggest Ms M was offered and rejected a carer's direct payment.
- Mr N**
35. A review of Mr N's care and support plan took place in September 2017. It concluded Mr N was eligible for care. The review was arranged because of the closure of Kentish Road and the need to identify alternative respite care for him. Mr N was noted to be anxious about Kentish Road closing. He had visited a Shared Lives property but did not want to go and Ms M felt the stairs there were too narrow for him as he had poor balance, an unsteady gait and was at high risk of falls.
36. Ms M also had concerns about Weston Court. She visited and felt it was too small for Mr N because of his problems with walking. She was also worried about access to outside space.
37. An undated draft care and support plan for Mr N said '*Weston Court was to be explored via an open day in September 2017.*'

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38. A final care and support plan in the middle of November 2017 said Mr N did not need one to one support to stay safe but may require supervision. The plan described Mr N's care and support needs and outcomes and set out the care services and funding the Council had agreed. The plan named Weston Court as the suitable respite care provision and set out his personal budget and entitlement to 28 nights a year of respite care. It noted a physiotherapist was going to visit Weston Court with Ms M to discuss her concerns.
  39. Council and NHS staff had discussions with Ms M about the respite arrangements for Mr N and his brother between December and June 2018. I have summarised these discussions in the next section (Mr O.) Despite several attempts at seeking a resolution, there was no agreement and so Ms M did not get any respite until Kentish Road reopened.
  40. A care and support plan of June 2018 was similar to the plan described in paragraph 38. The update was that Mr N was going to have respite care at Kentish Road when it opened.

### **Mr O**

41. A social worker carried out a review in September 2017. Mr O remained eligible for care services. The review noted Mr O and Ms M were both anxious about the closure of Kentish Road.
42. An undated draft care and support plan for Mr O described his needs and services. Mr O had worse balance and mobility and spoke less than his brother. They spent much time together but had different interests and personalities. The plan said Weston Court was to be considered as a respite option but this need to be explored further and Ms M was concerned about the size of the building. It set out Mr O's personal budget and entitlement to 28 nights of respite per year.
43. Ms M and the social worker spoke in October 2017. Ms M said Mr O needed space to get around safely and she was worried about trip hazards due to the size of Weston Court. Ms M said she would prefer U care home. The social worker explained U care home was for people with complex physical health needs. The social worker suggested Ms M speak to the manager at Weston Court about her concerns, but Ms M was reluctant to visit as she felt it was not suitable.
44. The social worker set up a visit to Weston Court with a physiotherapist. The physiotherapist noted Kentish Road was probably the ideal environment for Mr O as it was more spacious than Weston Court. She noted Mr O tripped and fell in many environments and that Weston Court had no stairs.
45. The physiotherapist and Ms M met at Weston Court in November. The physiotherapist's view was that furniture could easily be moved to accommodate Mr O's needs and reduce risks. There was a shower seat Mr O could use when showering to reduce the risk of falling.
46. A care and support plan of November 2017 set out Mr O's respite care service at Weston Court.
47. Ms M met with the social worker and a manager in November. She repeated her concerns about space. The manager and social worker explained that falls could not be prevented and even in a large space Mr O could trip and fall because of his balance. They discussed another possible respite option, but Ms M declined this. A senior manager confirmed to Ms M that the Council considered Weston Court was a suitable respite option for Mr O and that a specialist physiotherapist

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- had made recommendations about moving furniture to maximise space and minimise the risk of trips.
48. Ms M and the social worker spoke in January 2018. Ms M reported Mr O had been having more falls. The social worker was concerned about the impact of caring for Mr O and Mr N without any respite care. Ms M reported high levels of stress.
  49. The social worker and physiotherapist visited Ms M in February. She had been unwell with a virus and professionals were concerned about her poor health and the demands on her as a carer. Ms M remained concerned about the space at Weston Court and reported an increase in Mr O's falls. The physiotherapist and Ms O visited Weston Court again in March. Ms M said the living room was a lot better as the sofa had been moved. The physiotherapist said Mr O and Mr N could shower safely at Weston Court using the shower seat that was already there. A staff member could stay behind the shower curtain to protect their privacy and dignity.
  50. The social worker spoke to Ms M in April and Ms M said her sons were concerned there would be nothing for them to do at Weston Court. The social worker said there would be activities arranged. The social worker spoke to Mr N and Mr O. They could not decide whether they would go to Weston Court or not.
  51. At a later visit in May, Mr N said he would not go to Weston Court. Mr O said he would do whatever his brother was doing. Mrs M told the social worker she did not feel she could force her sons to go to Weston Court.
  52. A care and support plan for Mr O in June 2018 is mostly the same as the earlier plan of November 2017. It noted Ms M had not had any overnight respite since Kentish Road closed. The plan for respite was for Mr O to go to Kentish Road now it had reopened.
  53. The social worker asked Ms M if she wanted a carer's assessment. Ms M said she did not; but she was worn out and wanted respite at Kentish Road.
  54. The Council told me:
    - It had not carried out a timely review of respite care and its carer's assessment did not consider Ms M's needs for respite;
    - The care and support plans for Mr N and Mr O with the alternative respite care offer was not available until just before the Council made the final decision to close Kentish Road. This created uncertainty;
    - Weston Court is not the same as Kentish Road, but it has a large community room and kitchen and support offered to develop independence;
    - Transition arrangements were lacking; Weston Court did not open until December 2017 (because of a delay in registering it with the Care Quality Commission) meaning there was no opportunity for a taster session;
    - It did not assess and record Mr N's or Mr O's mental capacity to make a decision on where they receive respite care, but Mr N is capable of representing himself and so there was a presumption of capacity;
    - It would have been appropriate to involve an independent advocate to ensure Mr N and Mr O's voices were heard and to facilitate their involvement in the assessment as far as possible;

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- The Council decided to re-open Kentish Road at the weekends (the period of highest demand) following feedback from carers about how much they valued it and to offer additional choice.
55. The Council offered to:
- Carry out a fresh assessment of Ms M's needs as a carer and agree a carer's support plan and personal budget to meet identified needs, including a review of the number of nights of respite care required;
  - Review Mr N and Mr O's care and support plans;
  - Appoint an independent advocate for Mr N and Mr O;
  - Carry out an assessment of their mental capacity to choose between respite options;
  - To make a payment of £8,000 to Ms A to reflect the 16 nights respite Mr N and Mr O did not receive (at £250 a night) plus £500 to reflect her avoidable time and trouble;
  - To apologise.

### **Was there fault?**

56. The decision to close Kentish Road meant the Council was required, under the Care Act, Mental Capacity Act and Care and Support Statutory Guidance to:
- Review Mr N and Mr O's care and support plan as there was a change in circumstances;
  - Take reasonable steps to agree any proposals to change services to meet eligible needs, having due regard of their wishes as a starting point;
  - Revise the care and support plans because of a change affecting the plan;
  - Carry out an assessment of their mental capacity to decide about proposed respite care arrangements. If the outcome was he lacked mental capacity, make decisions about respite care in his best interests;
  - Arrange an advocate if the Council considered Mr N and Mr O had significant difficulties taking part in the review, but only if there was no suitable person to represent them.
57. The Council carried out reviews in September 2017; this was two and a half months before Kentish Road closed and I consider this was in good time and there is no fault. The review noted Ms M's concerns about changes to respite care and sought an opinion from a specialist physiotherapy who confirmed Weston Court was suitable. I am satisfied the review was in line with paragraph 13.32 of the Care and Support Statutory Guidance and there is no fault.
58. I recognise Ms M's view was Weston Court was unsuitable, but I consider the Council took reasonable steps to reach agreement on the proposed changes by discussing her concerns and involving a physiotherapist who confirmed the layout of Weston Court could be made suitable for Mr O. I find the Council had due regard to Ms M's views in line with the *Davey* case (paragraph 20), and I have no grounds to criticise officers' view that, Weston Court could have met Mr N and Mr O's needs.
59. The Council issued a revised care and support plan in November 2017. This was in line with section 27 of the Care Act. However, it was very close to the date when Kentish Road was due to close and should have been issued at the same



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time as the review so the parties were informed in good time about the proposed changes to respite care. The delay created avoidable uncertainty for Ms M, Mr N and Mr O about future respite.

60. Delays in opening Weston Court meant there was no opportunity for an overnight visit to transition to the new service before Kentish Road closed, which the Council has already recognised as a fault.
61. The Council has recognised it should have carried out an assessment of Mr N's and Mr O's mental capacity to make decisions about respite care. The failure to do so is not in line with the Mental Capacity Act 2005 and is fault. It is not possible to say whether the outcome would have been any different had a capacity assessment taken place.
62. The Council was required to appoint an advocate for Mr N and Mr O, who have significant communication difficulties, if it did not consider there was a suitable person to represent his views. Ms M was an appropriate person to represent them and so I do not regard the failure to involve an advocate to be fault. I recognise the Council has offered an advocate in any event.

### **Ms M**

63. The Council should have offered Ms M an updated carer's assessment when it was reviewing Mr N's and Mr O's care and support plans. It has now offered a carer's assessment and the records suggest Ms M declined this.
64. There should also have been a carer's support plan for Ms M. The lack of a carer's support plan was not in line with statutory guidance and so is fault. However, I cannot conclude that any injustice arose because Ms M's care and support plan contained her respite entitlement and the approach of providing a service of benefit to the carer, directly to the adult is permitted, although the law required the Council to provide a carer's support plan as well.

### **Agreed action**

65. During my investigation, the Council offered to carry out reviews of Mr N's and O's care and support plans and of Ms M's carer's assessment and draw up a carer's support plan for her. The Council also offered to appoint advocates, carry out mental capacity assessments and apologise for the avoidable distress and confusion caused by its failure to send final care and support plans in good time. The Council will also make the payments described in paragraph 55 in recognition of the injustice caused. These actions are an appropriate remedy for the injustice caused and the Council should complete them within two months of my final decision.

### **Final decision**

66. There was fault in the way the Council made decisions about Mr N's and Mr O's future respite care. This caused them and their mother Ms M avoidable uncertainty and distress. To remedy the injustice the Council has agreed to apologise, carry out further reviews and a mental capacity assessment and make a payment to reflect the loss of respite care during the period of closure. I have completed my investigation.

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## **Parts of the complaint that I did not investigate**

67. I discontinued my investigation of the complaint about the closure of Kentish Road. Shortly after Ms M and others complained to us, the Council issued an internal report which found flaws in the way the Council made the decision to close. An Ombudsman's investigation could add nothing further to the report and actions already taken in response to the report. And, as the service has now reopened, there is no ongoing injustice to those affected by the closure. So it would not be an appropriate use of our resources to continue investigating this complaint as our focus is on complaints where there is significant injustice requiring a remedy.
68. I recognise that some carers would like Kentish Road to be open all the time and not just at weekends. But the Care Act makes it clear that councils can offer a range of services to meet eligible needs and there is no legal requirement for a council to run a specific care provision full-time. So there would be no grounds for me to recommend this.

## **Investigator's decision on behalf of the Ombudsman**