

19 February 2019

Complaint reference:
18 005 181

Complaint against:
Southampton City Council

The Ombudsman's final decision

Summary: There was fault in the way the Council made decisions about Mr J's future respite care. This caused 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 avoidable distress and uncertainty. This action is an appropriate remedy for the injustice.

The complaint

1. Ms I 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 the proposed alternatives were unsuitable.
2. They also complain about the decision-making which led to Kentish Road's closure.
3. Ms I wants Kentish Road to re-open and a payment to reflect her losses.

What I have investigated

4. I have investigated the first complaint. My reasons for stopping investigating the second complaint 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 saw a draft of this statement and I took 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.

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. 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 I and Mr J

33. Ms I is the carer for her two children, both of whom have learning disabilities. One, Mr J, is an adult, who cannot speak and communicates with sign language and pictures. Mr J has eligible needs and has a care and support plan which includes day care, a college placement (now ended), a direct payment for outreach support to access the community. The care and support plan also included council-arranged respite care, which was at Kentish Road until it closed.
34. The most recent carer's assessment for Ms I was in August 2015. It said she would like more respite for Mr J so she could care for her other child. She was eligible for support as a carer, as she could not carry out other caring responsibilities. There was no carer's support plan for Ms I.
35. Emails from Mr J's social worker to Ms I in summer 2017 said U care home (a home offering overnight respite care) was not an option for Mr J as it was reserved for people with physical disabilities. The social worker told Ms I there was no entitlement to a fixed number of respite nights; people were assessed and allocated respite depending on their needs and circumstances.
36. There was a review of Mr J's care and support plan in September. Mr J knew a review was taking place but he did not want to take part. The review noted:
- Mr J had been to an alternative respite unit (Y care home) for a trial. Staff felt they could not meet his needs;

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- Ms I did not want Mr J to go to Weston Court. She felt the social element at Kentish Road was hugely important for Mr J. Weston Court was a smaller unit and so she was worried there would be no opportunities for Mr J to socialise;
 - Mr J had 19 respite nights, Ms I wanted him to have 24 a year so he could go once a fortnight for one night. She wanted any new respite provision to foster his independence;
 - Ms I would benefit from Mr J's outreach support being reduced and his respite being increased to 24 nights a year.
37. A draft care and support plan in September described one of Mr J's personal outcomes as '*to find alternative respite provision which provides social opportunities.*' The services provided by the Council included 19 respite nights a year. The yearly allowance of respite nights was to be reviewed.
38. A further care and support plan in November said the intention was to decrease Mr J's outreach support and increase his respite. The plan noted the social worker considered Weston Court could meet Mr J's care and support needs and that Mr J could attend at the same time as his friends. (However, Ms I told me the care manager never told her Weston Court was suitable for Mr J). The plan also noted Ms I's concern that Mr J would be socially isolated. The respite services provided by the Council were still 19 nights a year.
39. There was a further review of Mr J's care and support plan in February 2018. The social worker noted '*it was recognised when I first worked with Mr J that his 19-night respite allocation should be increased to allow for more regular breaks (twice a month) but we agreed that until a new respite provision is found, there is little value in increasing nights.*' Managers at a funding panel had agreed Ms I could convert each residential respite night into 15 hours of outreach support as a temporary solution instead of accessing overnight respite care.
40. In January 2018, the social worker and Ms I met. Ms I was disappointed the Council had confirmed the decision to close Kentish Road and felt there was no option other than Weston Court.
41. In February, the social worker confirmed Mr J's respite nights could be converted into 15 hours of outreach support per night. The Council told me Ms I used a direct payment to arrange outreach support.
42. In June, the social worker emailed Ms I saying Kentish Road was reopening and Mr J was entitled to 13 nights over the next 6 months.
43. The records noted the social worker's view that Mr J lacked mental capacity to consent to respite care. The social worker recorded:
- He did not communicate with her other than to sign 'hello';
 - His autism limited him from taking part in discussions about his care;
 - He could only communicate his immediate needs in simple sign language;
 - He could not communicate whether or not he understood what respite care was.
44. The Council's position is:
- It accepted it did not review the carer's assessment of August 2015 and offered to do so in July 2018, but Ms I refused. (Ms I told me she has changed her mind and will take part in a carer's assessment);

- Weston Court was a different service from Kentish Road, but it gave opportunities to promote independence, including the use of a large kitchen and the chance to engage with other tenants of the supported living scheme;
- It offered Ms I a further option – to convert the nights of respite care into outreach support hours – this gave Ms I 390 extra hours of support a year or 7.5 hours a week. Ms I had used this to fund a support worker;
- There should have been a formal assessment of Mr J’s mental capacity around respite care;
- Mr J should have had an independent advocate to ensure his involvement in the needs assessment and care and support planning;
- It decided to reopen Kentish Road due to feedback from carers about its value and to offer additional choice. Mr J was booked in for respite care there for 12 nights up to the end of 2018;
- It accepted the decision to close Kentish Road created uncertainty for carers and clients;
- There was a delay sending final versions of the care and support plan to Ms I;
- There was no chance for Mr J to have an overnight stay at Weston Court as a transition because it did not open until December 2017;
- In the period between Kentish Road closing and the Council deciding Ms I could convert her respite nights in to outreach support hours, no arrangements were in place for respite and this was equivalent to 6.5 nights of respite that she did not receive.

45. During this investigation, the Council offered to apologise and:

- Carry out a full review of Ms I’s needs as a carer, review the number of nights of respite needed to enable her to maintain her wellbeing and support her other child and confirm the outcome promptly;
- Review Mr J’s care and support plan and confirm the outcome promptly;
- Carry out a mental capacity assessment for Mr I regarding respite care and appoint an advocate to help him take part in assessments and decisions about his care and support;
- Pay Ms I £1125 representing the 6 nights of respite care she should have had and did not take as outreach support, plus £500 for her avoidable time and trouble in complaining.

Was there fault?

46. 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 J’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 to Ms I’s (and Ms J’s) wishes as a starting point;
- Revise the care and support plan because of a change affecting the plan;
- Carry out an assessment of Mr J’s 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;

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- Arrange an advocate if the Council considered Mr J had significant difficulties taking part in the review, but only if there was no suitable person to assist him.
47. The Council carried out a review of Mr J's care and support plan in September 2017. This was in good time before the intended closure of Kentish Road and there is no fault. The revised care and support plan, which was discussed with Ms I and Mr J shortly before Kentish Road closed, set out Weston Court as the named respite provision. I consider the Council acted in line with Care and Support Statutory Guidance and with the Care Act 2014 and the *Davey* case in paragraph 20 and so there is no fault. The Council attempted to address concerns about socialising at Weston Court by suggesting Mr J's friends could attend at the same time. I consider the Council had due regard to Ms I and Mr J's wishes, although agreement could not be reached on Weston Court. In addition, the Council acted flexibly and without fault by agreeing the overnight respite entitlement could be converted into outreach hours instead. This meant that Ms I benefitted from most of Mr J's respite entitlement pro-rata, during the period Kentish Road was closed.
 48. Delays in registering Weston Court meant there was no opportunity for Mr J to have a taster overnight stay before it opened. The Council has already recognised this as a fault.
 49. The Council was required to appoint an advocate for Mr J, who has significant communication difficulties, if it did not consider there was a suitable person to represent his views. Ms I was an appropriate person to represent Mr J 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.
 50. The Council has carried out an assessment of Mr J's capacity to make decisions about respite care. This is in line with the Mental Capacity Act, but the Council should have completed it before the changes to his care plan were agreed. So it was too late and this is fault.

Ms I

51. The Council accepts it should have reviewed the number of respite nights Ms I could have, in particular because she asked for more. The Council accepts there should have been a review of the carer's assessment, although I note Ms I has recently declined a further assessment. I note Mr J's respite entitlement was in his care and support plan, but the Council should also have completed a carer's support plan for Ms I. the failure to do so is fault.

Did the fault cause injustice?

52. I found no fault in the way the Council dealt with the review of Mr I's care and support plan. Although there was no carer's support plan for Ms J, I do not consider this caused her injustice as the respite entitlement was set out in Mr J's care and support plan.
53. There was some fault in the failure to have in place arrangements for Mr J to transition to Weston Court. The Council accepts this and I consider this caused avoidable uncertainty and distress. The assessment of Mr J's mental capacity was too late. The Council has proposed actions and a payment which I consider remedy the injustice.

Agreed action

54. During my investigation, the Council offered to carry out reviews of Mr J's care and support plan and of Ms I's carer's assessment. The Council also offered to appoint an advocate for Mr J, carry out a mental capacity assessment and apologise for the avoidable distress and uncertainty. The Council will also make the payments described in paragraph 45 in recognition of the injustice caused. These actions are an appropriate remedy for the injustice and the Council should complete them within two months of my final decision

Final decision

55. There was fault in the way the Council made decisions about Mr J's future respite care. This caused 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 avoidable distress and uncertainty. This action is an appropriate remedy for the injustice and I have completed my investigation.

Parts of the complaint that I did not investigate

56. I discontinued my investigation of the complaint about the closure of Kentish Road. Shortly after Ms I 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.
57. 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