

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

Summary: There was fault in the way the Council made decisions about Ms D's future respite care. This caused Ms C and Ms D 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.

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## **The complaint**

1. Ms C 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 were unsuitable.
2. They also complain about the decision-making which led to Kentish Road's closure.
3. Ms C 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 received 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. There should be a personal budget setting out the cost of care. 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 with 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 C and Ms D**

33. Ms C is the main carer for her adult daughter, Ms D who has learning disabilities and challenging behaviour. She can speak and also uses sign language. Ms D has eligible needs and has a care and support plan which includes day care, care in the home and 35 nights a year of respite care.
34. A carer's assessment for Ms C took place in September 2017. The outcome was Ms C had eligible needs as a carer. A carer's support plan of October 2017 gave Ms C a payment of £34 a month to support her with transport and to enable her to socialise with friends.
35. A review of Ms D's care and support plan took place in September. The social worker completing the review noted Ms D had substantial difficulty being involved and there was previously an advocate which Ms C had felt was unnecessary because in her view, Ms D could express her views without an advocate. The review noted Ms C and Ms D's concerns about the closure of Kentish Road and in particular, Ms C's view that respite should be in a social setting. Ms C was concerned that there was a history of Ms D making allegations against others and this may be an issue in a new respite setting. Ms D was anxious about not knowing what the respite arrangements were going to be. Ms C felt there were too many changes and said she would like more respite care for Ms D.
36. In October 2017, Ms C complained to the social worker about respite care and other issues. She said she wanted an extra 56 nights a year of respite because she was experiencing a recurrence of chronic health problems and had additional caring responsibilities for other relatives. Ms C complained formally about the

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- failure to review Ms D's respite. The Council responded saying it would deal with the complaint through lawyers as Ms C had instructed a solicitor.
37. In November 2017, the Council sent Ms C a copy of Ms D's care and support plan which said Ms D was entitled to 35 nights of respite care a year and that Weston Court was suitable for this.
38. Ms C put forward two alternative proposals for Ms D's respite care. A senior manager explained one of those options was not available as it was in a neighbouring local authority and that authority reserved the unit for its own residents. The other option Ms C put forward, U care home, had no capacity. The senior manager also told Ms C that the Council considered Weston Court was suitable for Ms D, but the social worker would continue to find an alternative that Ms C and D were happy with.
39. Ms C contacted her local councillor. She met with a senior manager of the Council to discuss her concerns about respite care and other issues not part of this complaint. The Council told me the senior manager offered to arrange an advocate for Ms D at the meeting.
40. Ms C emailed the social worker at the end of April 2018 saying she needed a break and asking for some respite, possibly outreach support (where a respite carer would come to their home) or at U care home. The social worker replied saying the Council would not use outreach support as respite on an overnight basis due to cost and there was no capacity at U care home. However, Ms D could have respite at Weston Court and she could visit beforehand should she wish. Ms C replied saying she did not want overnight outreach support. The social worker asked her to give details of how many hours outreach support she needed and to explain who would be caring for Ms D overnight. It does not appear that the idea of respite care in the home was pursued by either the Council or Ms C and it was never formally set out on Ms D's care and support plan.
41. The Council decided to open Kentish Road at the weekends starting in July. A manager emailed Ms C in June 2018 to tell her that there would be an open day at Kentish Road and she could discuss her preferred dates there. The social worker confirmed she had referred Ms D to Kentish Road and it would try and arrange respite as soon as possible
42. Ms C emailed the social worker and a senior manager asking for dates for respite at Kentish Road to tie in with her visiting relatives abroad. The response was that those who had not been accessing respite would be prioritised. Others who had been getting respite elsewhere, could in principle return to Kentish Road, depending on how disruptive it was to the individual and taking into account relatives' views on this.
43. The Council said:
- It did not carry out a timely review of Ms C's needs as a carer to determine how many nights of respite were needed to sustain caring arrangements for Ms D;
  - Ms D should have been able to access respite for 20 nights during the period Kentish Road was closed, but there was no agreement on a suitable alternative;
  - It did not complete a mental capacity assessment for Ms D regarding decisions about her respite care;

- It should have commissioned an independent advocate to ensure Ms D's views were heard, although Ms C was an appropriate person to support her;
- The care and support plan, including confirmation of a suitable alternative respite provision was not finished until shortly before Kentish Road closed and this created uncertainty and delay.

44. The Council offered to:

- Apologise;
- Appoint an advocate for Ms D;
- Carry out a full review of Ms C and Ms D's needs, including a review of the number of respite nights needed;
- Carry out a mental capacity assessment for Ms D on her capacity to choose respite care;
- To carry on paying the current carers payment of £34 a month;
- To pay Ms C £5000 based on the cost of 20 nights of respite care she missed out on and £500 for her avoidable time and trouble.
- To apologise.

#### **Was there fault?**

45. 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 Ms D'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 D's (and Ms C's) wishes as a starting point;
- Revise the care and support plan because of a change affecting the plan;
- Carry out an assessment of Ms D's mental capacity to decide about proposed respite care arrangements. If the outcome was she lacked mental capacity, make decisions about respite care in her best interests;
- Arrange an advocate if the Council considered Ms D had significant difficulties taking part in the review, but only if there was no suitable person to assist her.

46. The Council carried out a review in September 2017; this was three months before Kentish Road closed and I consider this was in good time. The review recorded Ms C's concerns about changes to respite. I am satisfied the review noted Ms C's views and was in line with paragraph 13.32 of Care and Support Statutory Guidance and there is no fault.

47. I recognise Ms C's view that Weston Court was unsuitable, but the notes suggest this was a concern about any change in the social arrangements at respite care for her daughter. There is no requirement on a council to preserve respite arrangements permanently. I consider the Council took reasonable steps to reach agreement on the proposed changes by offering visits and also exploring other alternatives like additional outreach support, instead of overnight respite. I find the Council had due regard to Ms C'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 Ms D's needs.

48. 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

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when Kentish Road was due to close and should have been issued at the same time as the review so that Ms C and Ms D were informed in good time about the proposed changes to care. The delay created avoidable uncertainty for Ms C and Ms D about future respite.

49. 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.
50. The Council has recognised it should have carried out an assessment of Ms D'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.
51. The Council was required to appoint an advocate for Ms D, who has significant communication difficulties, if it did not consider there was a suitable person to represent his views. Ms C was an appropriate person to represent Ms D 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 C**

52. The Council carried out a carer's assessment for Ms C and a carer's support plan in September 2017 set out her personal budget. This is in line with section 10 of the Care Act 2014 and statutory guidance and there is no fault.
53. The Council has acknowledged it should have reviewed the number of nights of respite Ms C was entitled to when she asked for more nights. Also, it should have set out her respite entitlement in the carer's support plan and the failure to do this was not in line with statutory guidance and is a further fault.

### **Agreed action**

54. During my investigation, the Council offered to carry out reviews of Ms D's care and support plan and of Ms C's carer's assessment and carer's support plan for her. The Council also offered to appoint an advocate for Ms D, carry out a mental capacity assessment 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 44 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 Ms D's future respite care. This caused Ms C and Ms D 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. 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 C and others complained to us, the Council issued an internal report which found flaws in the way the Council made the decision to



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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**