

The Ombudsman's final decision

Summary: There was fault in the way the Council made decisions about Mr B'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 the loss of respite care during the period of closure. This action is an appropriate remedy for the injustice.

The complaint

1. Ms A 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 A 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 in 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 Ms A's complaint to us and supporting documents. I also considered the Council's response to my enquiries and the 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

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- home, care and support at home (such as outreach support), counselling and social work and information advice and advocacy. (*Care Act 2014, section 8*)
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 a personal budget reflecting 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.

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 A and Mr B**
33. Ms A is the only carer for her adult son, Mr B who has severe learning disabilities and can only speak a few words. He lives at home with Ms A and is eligible for social care. The Council arranges and funds a care package for Mr B, which includes respite care. He went to Kentish Road until it closed.
34. A review of Mr B's care and support plan took place in June 2017. This noted Mr B previously went to U care home for respite care. The review noted Ms A was a single parent and had caring responsibilities for another relative. She had no other informal support in her caring role. Mr B got 84 nights a year of respite care. Ms A's view was Mr B should have respite at U care home and she wanted a three-month transition period so Mr B could get used to U care home.
35. Mr B's social worker discussed respite arrangements with Ms A in July. The social worker gave her options for respite including a care provider taking Mr B out in the evenings after college. Ms A said Mr B did not like staying out late. She said she did not mind having more than one location for respite care.
36. Internal emails between council officers in August suggested U care home might be able to provide all Mr B's respite nights. Later emails indicated this was not the case because U care home had a waiting list and could in fact only provide Mr B with 30 nights for the financial year ending March 2018. The total number of nights per year available at U care home for all former Kentish Road clients was 300.
37. Ms A spoke to a service manager in August. He told her:

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- The Council was commissioning alternative respite and this would be available shortly;
 - He could not discuss individual cases, but the places at U care home would be shared fairly;
 - Weston Court was available as an alternative.
38. Ms A told the service manager she was not happy with the Council's plans and said there had not been a transition to the new arrangements.
39. A further review of Mr B's care and support plan took place in September. The record of this review is similar to the review in June described above.
40. A draft care and support plan in September described Mr B's care needs and the services the Council provided to meet those needs. It also set out Mr B's personal budget. Services included 84 nights a year of respite care. The care and support plan said Mr B was *'to be supported to use Weston Court'* and that initial respite was to be at U care home.
41. Ms A emailed the social worker saying she was concerned Mr B would not be with his friends in respite care as the client group in U care home was different. She was concerned Mr B would be isolated. Ms B also said staff at U care home had told her there was no capacity for them to take Mr B.
42. Ms A and the social worker discussed respite arrangements again in the middle of September. The social worker proposed Mr B received respite care at Weston Court and U care home.
43. Ms A and the social worker met again in November. The social worker told Ms A Mr B could have 48 nights at U care home and that the Council's view was that Weston Court could meet his needs. Ms A was concerned about the lack of space at Weston Court. The social worker said Weston Court was bigger than the family home and Mr B's social interaction was maintained at day care and so isolation was not a concern. Ms A sent an email to the social worker refusing Weston Court.
44. The Council updated Mr B's care and support plan in November (because some carers told officers respite arrangements were not clear). The new plan for Mr B said respite was 84 nights a year and would be at U care home for six months and then at Weston Court. The plan noted Ms A had visited Weston Court and felt there was not enough space.
45. The social worker visited Ms A to discuss the care and support plan. Ms A said Mr B needed a garden, a sensory room and more space. She said she wanted amendments to the care and support plan to reflect this. The social worker later checked with staff at Kentish Road who told her Mr B never asked to go in the garden when he stayed there.
46. The Council told us it offered to make up half Mr B's respite care (so the nights U care home could not provide) with a direct payment that Ms A could use to purchase 630 hours of home care and support (based on 15 hours a night) so Mr B could receive respite care at home to replace the care Ms A normally provided. The records indicate Ms A arranged respite care for Mr B using an outreach support worker. This was because there was no availability at U care home in December 2017. The social worker offered two other placements in other care homes in December, but Ms A rejected these.

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47. Ms A visited T care home in January 2018, which was not in the Council's area. The social worker asked if this service would accept Southampton clients, but it would not.
48. A carer's assessment for Ms A took place in January 2018. It described the care she carried out, what she wanted to achieve and said she had eligible carer's needs. A carer's support plan set out a carer's personal budget for Ms A that she could use flexibly. The plan suggested Ms A was due 17 nights of respite care.
49. In February, Ms A asked the social worker if Mr B could have 48 nights at U care home and the remainder at a X care home. A service manager refused this, because Ms A said the care home required one to one support at X care home and this was too expensive. The service manager told Ms A again that Weston Court was suitable for Mr B and there was no need for any parent to be without respite.
50. Mr B's social worker visited Ms A in May 2018. He noted the Council had agreed Mr B could have 15 hours of outreach support for each respite night the Council had not provided.
51. In June 2018, the Council decided to reopen Kentish Road and Mr B's social worker referred him there. The social worker also asked Ms A about advocacy for Mr B and Ms A refused this.
52. The Council told me:
- It had not carried out a timely review of respite care and its carer's assessment did not consider Ms A's needs for respite;
 - The care and support plan 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;
 - It considered Weston Court was a suitable respite location for Mr B with capacity to provide all the nights agreed;
 - 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 B's mental capacity to make a decision on where he receives respite care. A social worker completed a mental capacity assessment in June 2018 and the outcome of this was Mr B had capacity to consent to receiving respite care at Weston Court. The assessment did not consider whether Mr B had capacity to weigh up and express a preference between alternative options;
 - It would have been appropriate to involve an independent advocate to ensure Mr B's voice was heard and to facilitate his involvement in the assessment as far as possible;
 - 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;
 - Its records showed that Mr B went to U care home for respite care for 33 nights between December 2017 and July 2018 (which is fewer than the 49 nights if allocated pro-rata);

- Mr B is booked to receive 26 nights at Kentish Road between July and December 2018. And he can go to U care home for the remaining nights so there has not been a failure to provide respite up to the agreed 84 nights
- The current plan is for Mr B's respite nights to be split equally between U care home and Kentish Road.

53. The Council has offered to:

- Carry out a fresh assessment of Ms A'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 B's care and support plan;
- Appoint an independent advocate for Mr B;
- Carry out an assessment of Mr B's mental capacity to choose between respite options'
- To make a payment of £4000 to Ms A to reflect the 16 nights respite Mr B did not receive (at £250 a night) plus £500 to reflect her avoidable time and trouble
- To apologise.

Was there fault?

54. 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 B'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 Mr B's (and Ms A'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 B'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;
- Arrange an advocate if the Council considered Mr B had significant difficulties taking part in the review, but only if there was no suitable person to assist him.

55. The Council carried out a review in June 2017; this was six months before Kentish Road closed and I consider this was in good time and there is no fault. The review noted Ms A's concerns about changes to Mr B's respite care and that she wanted him to go to U care home when Kentish Road closed. I am satisfied the review was in line with paragraph 13.32 of the Care and Support Statutory Guidance and there is no fault.

56. The Council issued a revised draft care and support plan in September 2017 setting out the agreed respite offer of U care home for some of Mr B's respite entitlement. It sent a further care and support plan in November naming Weston Court as a second option because U care home could not provide all of Mr B's agreed respite nights. I recognise Ms A did not share the Council's view that Weston Court was suitable, but I consider the records evidence it considered her concerns and addressed those concerns in respect of size and social isolation. And officers met with her to discuss the concerns and offered a further option of converting some of the respite nights into home care support. I note agreement could not be reached about the suitability of Weston Court. I consider the Council

had due regard to Ms A's wishes in line with the Davey case (paragraph 20) and there are no grounds for me to criticise the view that Weston Court could have met Mr B's needs.

57. Delays in opening Weston Court meant there was no opportunity for Mr B to have an overnight visit to transition to the new service before Kentish Road closed, which the Council has already recognised as a fault.
58. The Council has recognised it should have carried out an assessment of Mr B's mental capacity to decide on the options of respite care available to him (as opposed to an assessment of his capacity to consent to Weston Court, which was completed in June 2018). That assessment should have been done before Kentish Road closed. The failure to do so means the Council did not act in line with the Mental Capacity Act and so is at fault. It is not possible for me to say whether the outcome would have been any different had a capacity assessment taken place at the right time
59. The Council was required to appoint an advocate for Mr B, who has significant communication difficulties, if it did not consider there was a suitable person to represent his views. Ms A was an appropriate person to represent Mr B 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, which Ms A does not feel is necessary.

Ms A

60. I consider the Council acted in line with the Care Act and Care and Support Statutory Guidance through a carer's assessment and carer's support plan in January 2018 setting out respite entitlement. Although this should have taken place at the same time as Mr B's care and support plan review (so in anticipation of the closure of Kentish Road and not after the event), I do not consider this caused any injustice as the respite entitlement was set out in Mr B's care and support plan.

Did the fault cause injustice?

61. I found no fault in the way the Council dealt with the review of Mr B's care and support plan. And, although I consider there was delay in completing Ms A's carer's assessment and carer's support plan, there is no injustice to her as Mr B's respite entitlement was set out on his plan.
62. There was some fault in the failure to have in place arrangements for Mr B to transition to Weston Court. The Council accepts this and I consider this caused avoidable uncertainty and distress. The Council has proposed actions and payments which I consider remedy the injustice.

Agreed action

63. During my investigation, the Council offered to carry out reviews of Mr B's care and support plan and of Ms A's carer's assessment and support plan. The Council also offered to appoint an advocate for Mr B, carry out a mental capacity assessment and apologise for the avoidable distress and uncertainty. The Council will also make the payments described in paragraph 53 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

64. There was fault in the way the Council made decisions about Mr B'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 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

65. I discontinued my investigation of the complaint about the closure of Kentish Road. Shortly after Ms A 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.
66. 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