

The illegal funding gap: a lawyer's perspective

Choice has become an increasingly fundamental principle of social care: evidenced in the significant expansion of direct payments to enable people with social care needs living in the community to exercise autonomy in how their care is delivered. It also underpins care-home provision – or does it?

The National Assistance Act (Choice of Accommodation) Directions 1992 (“the Choice Directions”)² apply to people for whom the arrangements are brokered by the local authority. They do not apply to anyone receiving fully-funded continuing NHS health care. Under the current understanding of the scope of the National Assistance Act duty, they also exclude self-funders.

The starting-point is that a potential care-home resident should live in the accommodation of her or his choice – “preferred accommodation” – but this right to choose is subject to important provisos:

- that the preferred accommodation appears to the local authority to be suitable to meet the assessed needs (suitability);
- that the arrangement ‘would not require the authority to pay more than they would usually expect to pay **having regard to his assessed needs**’ [emphasis added] (usual cost);
- the preferred accommodation is available (availability);
- that the proprietors will contract on the authority’s ‘usual terms and conditions’ (conditions);
- if the cost is greater than the authority would usually expect to pay having regard to the individual’s assessed needs, that a third party is willing and able to pay the difference (the top-up).

In most situations the top-up can only be made by a third party; the resident is by law prevented from funding his/her own top-up. The resident can pay the top-up from his/her own funds only during the initial 12 week period of permanent residency when the value of the home is disregarded, and in cases of deferred payments

New guidance under the Choice Directions was issued in 2004³. It is statutory guidance, under section 7 of the Local Authority Social Services Act 1970, which means that local authorities are required to follow it unless there is a very clear reason not to in an individual case. Otherwise non-compliance is likely to render any action taken unlawful.

The guidance makes a number of helpful points, including the following:

1. If, in order to meet an assessed need, it is necessary to place an individual in another area at a higher rate than the council’s usual costs, the placing council should meet the additional cost.
2. Individual residents should not be asked to pay more because of market inadequacies or commissioning failures.
3. Where there are insufficient places available at the council’s usual cost, the council should place in more expensive accommodation and bear the additional cost burden.

² For effect in Wales, see WOC 12/93 and WOC47/93

³ LAC (2004) 20

4. Councils should not set arbitrary ceilings on the amount they expect to pay, and have a statutory duty to provide residents with the level of service they could expect if the possibility of 'top-ups' did not exist.
5. Councils must never encourage or imply that care-home providers can seek further contributions from individuals to meet assessed needs.

In ten years as a community care lawyer and legal trainer I have seen a significant increase in the unlawful use of top-ups by local authorities. The victims are often retired family members on a low fixed income themselves who can suffer real hardship as a result.

(1) Misunderstanding of the relationship between the usual cost and the top-up provisions: individual assessed needs

What are the funding implications if the community care assessment finds, for instance, that a person needs to live in another (more expensive) locality in order to be close to a significant relative or friend, or that cultural requirements indicate a need for accommodation in a particular (more expensive) home?

All too often 'usual cost' is defined only by reference to a particular figure for a general category of resident – £425.00 for a high dependency residential placement etc. Provided the figure reflects the negotiated cost of care in the location, this is fine as a general policy, but not as an inflexible rule. The test for usual cost is an individual one, not a general one: the usual cost *'having regard to his assessed needs'*. So, in my examples, if the only home that is in the required location or offers the necessary culturally specific facilities costs £440 per week, that cost is, in law, the usual cost having regard to the individual's assessed needs and should be met in full by the local authority.

The same legal principles often apply when self-funders' assets have decreased and they are eligible for local authority funding. If they have been in the home for some time, are attached to it and, in many cases, could not make a successful move, then it is difficult to sustain a lawful argument that their care needs could be met anywhere else. In that situation, the usual cost is the rate the local authority has negotiated with the home in question, and no top-up is payable.

Misunderstanding of the relationship between the usual cost and the top-up provisions: availability

The Choice Directions and guidance are clear. If there is no home place available that will meet the individual's needs at the usual cost at the time the need is assessed, then the local authority should fund more expensive care. There is no legal justification for charging a top-up in this situation, nor can the provision of a care-home place be delayed for resource reasons.

If choice is to mean anything, the local authority must be able to offer an available bed in a care-home able to meet the individual's needs when that need is identified. The choice for the individual and his/her family then is whether to accept the offer or to choose a more expensive home that the individual /family prefer.

All too often families are simply told that they must make a contribution at a time when they are already undergoing the anxiety and stress of moving an older relative from hospital to a care-home. For instance, a typical case came to me while I was writing this. An older woman's savings are already below the then £12,750 lower capital limit (NB: £13,000 at May 2007). A

third-party top-up is in place, which she is paying out of her savings [also unlawful], although the Council chose the home she would go to on discharge from hospital and offered her no choice.

(2) “The council doesn’t charge a top-up, but the homes do”

I have been told this by individual local authority staff and have just seen it in a draft standard contract between a local authority and care-home providers, “Any third-party payment sought by the Service Provider must be negotiated between the Service Provider and the potential Third Party...”. In this particular contract the information was then to be given to the council who would draw up a third-party contract with the council. This would not bring the arrangement within the law.

The contract between the council and the care-home must be for the full cost of meeting the individual’s assessed needs. The legal framework allows some flexibility about whether the resident’s contribution and the top-up are paid to the local authority or directly to the home, but that is all. The *responsibility* for negotiating the fee with the home rests with the local authority; it is part and parcel of arranging the care. As the guidance puts it, “Councils must never encourage or otherwise imply that care-home providers can or should seek further contributions from individuals in order to meet assessed needs”.

The only circumstances in which a care-home may make independent charging arrangements with a third party is for services that are *genuinely* additional to the assessed needs of the individual, for instance for a larger room with access to the garden in circumstances where such direct access is not an assessed need. That is not a top-up, but an arrangement made between the home and the family for additional services over and above those lawfully required to be provided under the contract with the local authority to meet all the individual’s assessed needs.

The dividing line may be difficult to draw in individual cases and local authorities should be alert to ensure that homes do not exploit this by charging third parties for services that, properly construed, form part of their care plan. Instead, some local authorities are putting in place systems that directly or indirectly encourage malpractice and exploitation. In the process they fail to fulfill their own legal duties.

Recommendations

The widespread illegal conduct of local authorities in relation to top-ups and of PCTs in relation to continuing health care decisions are testimony to a failing system no longer ‘fit for purpose’. A comprehensive review of the funding of long-term care is long overdue.

In the short term, funding levels must be increased to enable the inequity of cross-subsidy (described by other contributors to this paper) to be addressed. Help the Aged believes that local authorities should arrange the accommodation for all care-home residents who want it and then charge individuals according to the statutory means test. This would enable self-funders to benefit from block contracting or other local agreements and would end the current cross-subsidy.

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