

Care and Support Statutory Guidance

Annex A: Choice of accommodation and additional payments

This annex covers:

- choice of accommodation when arranging care and support in an accommodation setting
- making additional payments for preferred accommodation

1) A person's ability to make an informed choice is an important element of the care and support system. This must extend to where the care and support planning process has determined that a person needs to live in a specific type of accommodation to meet their care and support needs.

2) The care and support planning process will have determined what type of accommodation will best suit the person's needs. This could be, for example, a care home, shared lives or extra care housing. Where the type of accommodation is one of those specified in regulations, the person will have a right to choose the particular provider or location, subject to certain conditions. Where this is the case, the following guidance should be applied and in doing so, local authorities should have regard to the following principles:

- good communication of clear information and advice to ensure well informed decisions
- a consistent approach to ensure genuine choice
- clear and transparent arrangements for choice and any 'top-up' arrangements
- clear understanding of potential consequences should 'top-up' arrangements fail with clear exit strategies
- the choice is suitable to the person's needs

3) Local authorities **must** also remember that the regulations and guidance on choice of accommodation and additional costs apply equally to those entering care for the first time, those who have already been placed by a local authority, and those who have been self-funders, but because of diminishing resources are on the verge of needing local authority support.

4) Local authorities should also be mindful of their duties under Section 1 of the Care Act 2014 to promote individual wellbeing. Further detail is available in Chapter 1.

Choice of accommodation

5) Where a local authority is responsible for meeting a person's care and support needs and their needs have been assessed as requiring a particular type of accommodation in order to ensure that they are met, the person must have the right to choose between different providers of that type of accommodation provided that:

- the accommodation is suitable in relation to the person's assessed needs

- to do so would not cost the local authority more than the amount specified in the adult's personal budget for accommodation of that type
- the accommodation is available
- the provider of the accommodation is willing to enter into a contract with the local authority to provide the care at the rate identified in the person's personal budget on the local authority's terms and conditions

6) This choice must not be limited to those settings or individual providers with which the local authority already contracts with or operates, or those that are within that local authority's geographical boundary. It must be a genuine choice across the appropriate provision.

7) If a person chooses to be placed in a setting that is outside the local authority's area, the local authority must still arrange for their preferred care. In doing so, the local authority should have regard to the cost of care in that area when setting a person's personal budget. Local authorities should also read the guidance on ordinary residence in chapter 19.

Suitability of accommodation

8) In exercising a choice, a local authority must ensure that the accommodation is suitable to meet a person's assessed needs and identified outcomes established as part of the care and support planning process.

9) People are able to express a preference about the setting in which their needs are met through the care and support planning process. This process considers both the person's needs and preferences and detailed guidance is set out in Chapter 10. Once this is agreed, the choice is between different settings, not different types. For example, a person cannot exercise the right to a choice of accommodation to choose a shared lives scheme when the care and support planning process, which involves the person, has assessed their needs as needing to be met in a care home.

Cost

10) The care and support planning process will identify how best to meet a person's needs. As part of that, the local authority must provide the person with a personal budget, except in cases or circumstances set out in the Care Act (Personal Budget) Regulations. The Personal Budget is an important tool that provides clear information on the cost of meeting the person's needs. Further guidance on how to undertake care and support planning and calculate a personal budget is set out in Chapters 10 and 11.

11) The personal budget is defined as the cost to the local authority of meeting the person's needs which the local authority chooses or is required to meet. However, the local authority should take into consideration cases or circumstances where this 'cost to the local authority' may need to be adjusted to ensure that needs are met. For example, a person may have specific dietary requirements that can only be met in specific settings. In all cases the local authority must have regard to the actual cost of good quality care in deciding the personal budget to ensure that the amount is one that reflects local market conditions. This should also reflect other factors such as the person's circumstances and the availability of provision. In addition, the local authority should not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care. Guidance on market shaping and

commissioning is set out in Chapter 4. Local authorities **must** also have regard to the guidance on personal budgets in Chapter 11, and in particular paras. 11.22-11.24 on calculating the personal budget.

12) A person must not be asked to pay a ‘top-up’ towards the cost of their accommodation because of market inadequacies or commissioning failures and must ensure there is a genuine choice. The local authority therefore **must** ensure that at least one option is available that is affordable within a person’s personal budget and should ensure that there is more than one. If no preference has been expressed and no suitable accommodation is available at the amount identified in a personal budget, the local authority must arrange care in a more expensive setting and adjust the budget accordingly to ensure that needs are met. In such circumstances, the local authority must not ask for the payment of a ‘top-up’ fee. Only when a person has chosen a more expensive accommodation can a ‘top-up’ payment be sought. Paras. 20 and 21 set out guidance on additional costs.

Availability

13) Local authorities have specific duties to shape and facilitate the market of care and support services locally, including ensuring sufficient supply. As a result, a person should not have to wait for their assessed needs to be met. However, in some cases, a short wait may be unavoidable, particularly when a person has chosen a particular setting that is not immediately available. This may include putting in place temporary arrangements – taking in to account the person’s preferences and securing their agreement – and placing the person on the waiting list of their preferred choice of provider for example. It should be remembered however that such arrangements can be unsettling for the person and should be avoided wherever possible.

14) In such cases, the local authority must ensure that in the interim adequate alternative services are provided and set out how long the interim arrangement may last for. In establishing any temporary arrangements, the local authority must provide the person with clear information in writing on the detail of the arrangements as part of their care and support plan. As a minimum this should include the likely duration of the arrangement, information on the operation of the waiting list for their preferred setting alongside any other information that may be relevant. If any interim arrangements exceed 12 weeks, the person may be reassessed to ensure that both the interim and the preferred option are still able to meet the person’s needs and that remains their choice.

15) Where a person contributes to the cost of their care following a financial assessment they must not be asked to pay more than their assessment shows they can afford.

16) In some cases a person may decide that they wish to remain in the interim setting, even if their preferred setting subsequently becomes available. If the setting where they are temporarily resident is able to accommodate the arrangement on a permanent basis this should be arranged and they should be removed from the waiting list of their original preferred setting. Before doing so, the local authority must make clear the consequences of that choice, including any financial implications.

Choice that cannot be met and refusal of arrangements

17) Whilst a local authority should do everything it can to meet a person's choice, inevitably there will be some instances where a choice cannot be met, for example if the provider does not have capacity to accommodate the person. In such cases, a local authority must set out in writing why it has not been able to meet that choice and should offer suitable alternatives. It should also set out the detail of the local authority's complaints procedure and if and when the decision may be reviewed.

18) A local authority must do everything it can to take into account a person's circumstances and preferences when arranging care. However, in all but a very small number of cases, such as where a person is being placed under guardianship under Section 7 of the Mental Health Act 1983, a person has a right to refuse to enter a setting whether that is on an interim or permanent basis. Where a person unreasonably refuses the arrangements, a local authority is entitled to consider that it has fulfilled its statutory duty to meet needs and may then inform the person in writing that as a result they need to make their own arrangements. This should be a step of last resort and local authorities should consider the risks posed by such an approach, for both the authority itself and the person concerned. Should the person contact the local authority again at a later date, the local authority should reassess the needs as necessary and re-open the care and support planning process.

Contractual terms and conditions

19) In supporting a person's choice of setting, the local authority may need to enter into a contract with a provider that they do not currently have an arrangement with. In doing so, they should ensure that the contractual conditions are broadly the same as those they would negotiate with any other provider whilst taking account of the individual circumstances. Strict or unreasonable conditions should not be used as a means to avoid or deter the arrangement.

Additional costs or 'top-up' payments

20) In some cases, a person may actively choose a setting that is more expensive than the amount identified for the provision of the accommodation in the personal budget. Where they have chosen a setting that costs more than this, an arrangement will need to be made as to how the difference will be met. This is known as an additional cost or 'top-up' payment and is the difference between the amount specified in the personal budget and the actual cost. In such cases, the local authority must arrange for them to be placed there, provided a third party, or in certain circumstances the person in need of care and support, is willing and able to meet the additional cost.

21) The following sections of guidance only apply where the person has chosen a more expensive setting. Where someone is placed in a more expensive setting solely because the local authority has been unable to make arrangements at the anticipated cost, the personal budget must reflect this amount. The person would then contribute towards this personal budget according to the financial assessment. The additional cost provisions must not apply in such circumstances.

Agreeing a 'top-up' fee

22) Having chosen a setting that is more expensive, based on good information and advice, the local authority should ensure that the person understands the full implications of this choice, remembering that this is often a point of crisis. This should include for example that a

third party, or in certain circumstances the person needing care and support, will need to meet the additional cost of that setting for the full duration of their stay and that should the additional cost not be met they may be moved to an alternative setting.

23) The local authority must ensure that the person paying the ‘top-up’ is willing and able to meet the additional cost for the likely duration of the arrangement, recognising that this may be for some time into the future. Therefore it must ensure that the person paying the ‘top-up’ enters into a written agreement with the local authority, agreeing to meet that cost. The agreement must, as a minimum, include the following:

- the additional amount to be paid
- the amount specified for the accommodation in the person’s personal budget
- the frequency of the payments
- to whom the payments are to be made
- provisions for reviewing the agreement
- a statement on the consequences of ceasing to make payments
- a statement on the effect of any increases in charges that a provider may make
- a statement on the effect of any changes in the financial circumstances of the person paying the ‘top-up’

24) Before entering into the agreement, the local authority must provide the person paying the ‘top-up’ with sufficient information and advice to ensure that they understand the terms and conditions, including actively considering the provision of independent financial information and advice. Further detail on each of these points is set out below.

25) Ultimately, if the arrangements for a ‘top-up’ were to fail for any reason, the local authority would need to meet the cost or make alternative arrangements, subject to a needs assessment. Further details are set out below in the consequences of ceasing to make payments. Local authorities should therefore maintain an overview of all ‘top-up’ agreements and should deter arrangements for ‘top-up’ payments to be paid directly to a provider.

The amount to be paid

26) The amount of the ‘top-up’ should be the difference between the actual costs of the preferred provider and the amount that the local authority would have set in a personal budget or local mental health after-care limit to meet the person’s eligible needs by arranging or providing accommodation of the same type. When considering the cost of care in its area, the local authority is likely to identify a range of costs which apply to different circumstances and settings. For the purposes of agreeing a ‘top-up’ fee the local authority must consider what personal budget it would have set at the time care and support is needed. It should not automatically default to the cheapest rate or to any other arbitrary figure.

Frequency of payments

27) In agreeing any ‘top-up’ arrangement, the local authority must clearly set out how often such payments need to be made, for example, on a weekly or monthly basis.

Responsibility for costs and to whom the payments are made

28) When entering into a contract to provide care in a setting that is more expensive than the amount identified in the personal budget, the local authority is responsible for the total cost of that placement. This means that if there is a break down in the arrangement of a 'top-up', for instance if the person making the 'top-up' ceases to make the agreed payments, then the local authority would be liable for the fees until it has either recovered the additional costs it incurs or made alternative arrangements to meet the cared for person's needs.

29) In terms of securing the funds needed to meet the total cost of the care (including the 'top-up' element) a local authority has 3 options, except where it is being funded by a deferred payment agreement, in which case it is added to the amount owed. In choosing which option to take it will need to consider the individual circumstances of the case, and should be able to assure itself of the security of the arrangements and that there is no undue pressure on the person making the 'top-up' payment to increase the level of payment. Whichever option it chooses, it remains responsible for the total amount. The 3 options are:

- treat the 'top-up' payment as part of the person's income and therefore recover the costs from the person concerned through the financial assessment (where the 'top-up' payments are being made by a third party rather than the cared for person, this is on the assumption that the third party makes the payment to the person with care needs)
- agree with the person, the third party paying the 'top-up' (if this is not the cared for person) and the provider that payment for the 'top-up' element can be made directly to the provider with the local authority paying the remainder. However, as stated earlier, this is not recommended.
- the person making the 'top-up' payments pays the 'top-up' amount to the local authority. The local authority then pays the full amount to the provider

30) In the cas of people with eligible needs who pay in full for their own care and support who asks the local authority to arrange their care, refer to paragraph 41.

Provisions for reviewing the agreement

31) As with any financial arrangement, an agreement to make a 'top-up' payment must be reviewed. A local authority **must** set out in writing details of how the arrangements will be reviewed, what may trigger a review, and circumstances when any party can request a review.

32) Local authorities should also consider how often it may be appropriate to review the arrangements. In doing so it should bear in mind how often it reviews other financial arrangements, such as deferred payment agreements. These should take place at least annually and in line with wider reviews of the financial assessment.

Consequences of ceasing to make payments

33) The local authority must make clear in writing the consequences should there be a break down in the arrangement to meet the cost of the 'top-up'. This should include that the person may be moved to an alternative accommodation where this would be suitable to meet their needs and affordable within the personal budget or local mental health after-care limit. As with any change of circumstance, a local authority must undertake a new assessment before considering this course of action, including consideration of a requirement for an assessment of health needs, and have regard to the person's wellbeing.

Price increases

34) Arrangements will need to be reviewed from time to time, for example in response to any changes in circumstances of the cared for person, the person making the 'top-up' payments (if this is different from the cared for person), local authority commissioning arrangements or a change in provider costs. However, these changes may not occur together and a local authority must set out in writing how these changes will be dealt with.

35) The local authority must clearly set out in writing to the person or persons concerned its approach to how any increased costs may be shared. This should also include details of how agreement will be reached on the sharing of any price increases. This should also state that there is no guarantee that these increased costs will automatically be shared evenly should the provider's costs rise more quickly than the amount the local authority would have increased the personal budget or local mental health after-care limit and there is an alternative option that would be affordable within that budget.

36) A local authority may wish to negotiate any future price rises with the provider at the time of entering into a contract. This can help provide clarity for adults and providers and help ensure that the top up remains affordable.

37) The local authority should also make clear that where the person has a change in circumstances that requires a new financial assessment and this results in a change in the level of contribution the person themselves makes, this may not reduce the need for a 'top-up' payment.

Consequences of changes in circumstances of the person making the 'top-up' payment

38) The person making the 'top-up' payment could see an unexpected change in their financial circumstances that will impact their ability to continue to pay the 'top-up' fee. Where a person is unable to continue making 'top-up' payments, the local authority may seek to recover any outstanding debt and has the power to make alternative arrangements to meet a person's needs, subject to a needs assessment. The local authority must set out in writing how it will respond to such a change and what the responsibilities of the person making the 'top-up' payment are in terms of informing the local authority of the change in circumstances.

First party 'top ups'

39) The person whose needs are to be met by the accommodation may themselves choose to make a 'top-up' payment only in the following circumstances:

- where they are subject to a 12-week property disregard (See chapter 8 on Charging)
- where they have a deferred payment agreement in place with the local authority. Where this is the case, the terms of the agreement should reflect this arrangement. For further guidance on deferred payment agreements see Chapter 9.
- where they are receiving accommodation provided under S117 for mental health aftercare

People who are unable to make their own choice

40) There will be cases where a person lacks capacity to express a choice for themselves. Local authorities should therefore act on the choices expressed by the person's advocate, carer or legal guardian in the same way they would on the person's own wishes, unless in the local authority's opinion it would be against the best interests of the person.

Self-funders who ask the local authority to arrange their care

41) The Care Act 2014 enables a person who can afford to pay for their own care and support in full to ask the local authority to arrange their care on their behalf. Where the person requires care in a care home to meet their needs, the local authority may choose to respond to the person's request by meeting their needs. Where the person requires some other type of care, including other types of accommodation to which the right to a choice applies, the local authority must meet those needs. In such circumstances, whether because the authority chooses to meet needs in a care home, or is required to meet needs in some other type of accommodation, the same rules on choice **must** apply.

42) In supporting self-funders to arrange care, the local authority may choose to enter into a contract with the preferred provider, or may broker the contract on behalf of the person. Where the local authority is arranging and managing the contract with the provider, it should ensure that there are clear arrangements in place as to how the costs will be met, including any 'top-up' element.

43) Ultimately, the local authority should assure itself that robust contractual arrangements are in place in such circumstances that clearly set out where responsibilities for costs lie and ensure that the person understands those arrangements. Self-funders will have to pay for the costs of their care and support including, in cases where they choose a setting that is more expensive than the amount identified in their personal budget, the top-up element of the costs of that setting.

Choice of accommodation and mental health after-care

44) Regulations made under section 117A of the Mental Health Act 1983 enable persons who qualify for after-care under section 117 to express a preference for particular accommodation if accommodation of the types specified in the regulations is to be provided as part of that after-care. Local authorities are required to provide or arrange the provision of the preferred accommodation if the conditions in the regulations are met.

45) The regulations give people who receive mental health after-care broadly the same rights to choice of accommodation as someone who receives care and support under the Care Act 2014. But some differences arise because after-care is provided free of charge and, as the legislative requirement for a care and support plan under the Care Act 2014 does not apply to section 117 after-care, the care plan should instead be drawn up under guidance on the Care Programme Approach (CPA). Care planning under the CPA should, if accommodation is an issue, include identifying the type of accommodation which is suitable for the person's needs and affording them the right to choice of accommodation set out in the regulations made under section 117A. The person should be fully involved in the care planning process.

46) An adult has the right to choose accommodation provided that:

- the preferred accommodation is of the same type that the local authority has decided to provide or arrange
- it is suitable for the person's needs
- it is available (see guidance in paras. 13-16) for mental health after-care purposes ('assessed needs' means needs identified in the CPA care plan)
- where the accommodation is not provided by the local authority, the provider of the accommodation agrees to provide the accommodation to the person on the local authority's terms (see guidance in para. 18)

47) The principles in paras. 5, 6, 7 and 40 apply equally where a local authority is providing, or arranging the provision of, accommodation in discharge of its after-care duty. The guidance in paras. 17 and 18 applies when the preferred choice cannot be met.

48) Where the cost of the person's preferred accommodation is more than the local authority would provide in a personal budget or local mental health after-care limit to meet the person's needs, then the local authority **must** arrange for them to be placed there, provided that either the person or a third party is willing and able to meet the additional cost.

49) The guidance in paras. 20 to 38 applies where the adult has chosen more expensive accommodation. For the purposes of section 117 after-care, however, references to a third party should be read as including the adult receiving the after-care (because an adult can also meet the additional cost when a local authority is providing, or arranging for the provision of accommodation in discharge of the after-care duty).

50) In securing the funds needed to meet the additional cost, one of the following will apply:

- a local authority may agree with the person and the provider, and in cases where a third party is paying the 'top-up', agree with that third party, that payment for the additional cost can be made directly to the provider with the local authority paying the remainder
- the person or the third party pays the 'top-up' amount to the local authority. The local authority then pays the full amount to the provider

Information and advice

51) For individuals to be able to exercise genuine choice they need information about the options open to them. They should be given clear and balanced information with which to make the best choice of accommodation. The local authority should explain to individuals their rights under the Care Act. Individuals should be told explicitly that they may allow the local authority to make a decision about accommodation on their behalf, or, if they wish, they are free to choose any accommodation subject to the constraints set out in the regulations.

52) Under Section 4 of the Care Act 2014 a local authority **must** establish and maintain a service for providing people in its area with information and advice in relation to care and support. This must include information and advice about the different care providers available in the local area to enable choice as well as information and advice to help people to understand care charges, different ways to pay and money management. Local authorities should also have a role in facilitating access to financial information and advice provided independently of the local authority, including regulated information and advice where appropriate; to support people in making informed financial decisions. This may be

particularly appropriate when a person is considering paying a top-up to help them to understand what they would be paying the top-up for and come to a judgment about whether it would represent good value for money.

53) Where a 'top-up' arrangement is being entered in to, all parties should fully understand their responsibilities, liabilities and the consequences of the arrangements. A local authority **must** provide the third party with sufficient information and advice to support them to understand the terms of the proposed written agreement before entering in to it. Local authorities **must** also have regard to the general guidance on Information and Advice set out in Chapter 3.

Complaints

54) Complaints about how choice or any 'top-up' arrangement is exercise by the local authority fall within the scope of the local authority's statutory complaints procedure.