Short changed:
The Care Bill, top-ups and the emerging crisis in residential care funding

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About Independent Age
Founded 150 years ago, Independent Age is a growing charity helping older people across the UK and Ireland through the ‘ABC’ of advice, befriending and campaigning. We offer a national telephone and email advice service focusing on social care, welfare benefits and befriending services, which is supported by a wide range of printed guides and factsheets. This is integrated with on-the-ground, local support, provided by a network of over 1,500 volunteers offering one-to-one and group befriending. For more information, visit our website www.independentage.org.

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1. Introduction

The long-term care system in England is undergoing significant reform to the rules on funding and entitlement to local authority support.

1.1. ‘Top-ups’ and the care system
Over 350,000 older people in England live in residential care. However, the residential care market has long been characterised by differences between fees paid by local authorities and ‘self-funders’. In between these groups, some people receiving local authority funding for their residential care costs also receive so-called third party ‘top-ups’ from a family member to live in more expensive accommodation.

In recent years, public spending cuts have put severe pressure on council budgets and the fees paid to residential care providers. The role of ‘top-ups’ in the care system, therefore, appears to have grown.

However, key aspects of the government’s plans for long-term care funding are set to transform England’s residential care market. In particular:

• more individuals will be entitled to financial local authority support for a portion of their residential care fees because of a more generous threshold for means tested support, and the application of the ‘cap’ on care costs
• individuals in receipt of a financial contribution to their residential care costs from their local authority will be able to ‘top-up’ their fees themselves, rather than only being able to rely on third party ‘top-ups’ from a family member.

These changes will create a new category of ‘self-funder top-ups’.

Importantly, the rules and treatment of ‘self-funder top-ups’ will have major consequences for the residential care market in England.

1.2. Aim of this report
In this context, this report aims to explore the effects of the government’s plans for reforming care funding on the role of ‘top-ups’ and the rules applied to them.

In Chapter 2, the operation of the current residential care market is described, including the growing use of ‘third party’ top-ups. Chapter 3 sets out the main components of the government’s care funding reforms that will result in ‘self-funder top-ups’ for the first time.

The fourth chapter explores if and how current rules on top-ups should be applied to ‘self-funder top-ups’. Chapter 5 concludes with key recommendations for policymakers.
2. Where are we now?
Residential care, top-ups and self-funders

The implementation of the Care Bill and the coalition government’s reforms to care funding will have significant implications for England’s residential care market. In particular, these changes will affect the operation of ‘top-up’ payments, price discrimination among providers and the way in which the price of residential care is set. This chapter sets out the context for the government’s reforms to social care by reviewing key aspects of the current residential care market in England.

2.1. Who pays for residential care in England?
Individuals in residential care in England fall into one of three categories:

- 175,000 ‘self-funders’ who pay for their residential care fees themselves
- 143,000 individuals whose residential care fees are paid by their council
- 56,000 individuals who ‘top-up’ the local authority funding they receive via so-called ‘third party payments’.

Source: Laing & Buisson (2013) ¹

Residential care in England by type

It has been estimated that between 2011 and 2012 there was a 4% rise in the number of council-funded residents relying on top-up payments. ²

The market research company, Laing & Buisson, found in its 2012 survey that the average level of fees paid by local authorities in England for residential care was £480 per week.

No information is available on the average fees paid by self-funders for residential care, nor on the average value of third party top-ups.
2.2. What determines the price of residential care to self-funders and local authorities?

Market forces determine the price of residential care in England. As such, the price of residential care varies across the country and is dependent upon supply and demand at a particular time in a particular location, for different types of care.

The maximum amount that a local authority will normally pay for different types of residential care in their area is referred to as the ‘usual cost’ rate (also called ‘standard cost’ rate).

However, it is widely acknowledged that the average level of residential care fees paid by local authorities is below that of self-funders.

Why does this difference in fees paid exist? This may result from one or more of three principal factors:

- **self-funders choosing more expensive care homes** than the local authority ‘usual cost’ rate because they wish to use their income and wealth to pay for better quality accommodation
- **the monopsony power of local authorities** - ie as the largest purchaser of residential care, their power to dictate prices to homes that are reliant on their business - enables them to use their buying power to secure lower rates. In part, such monopsony power exists because so many care home providers are small: data from the Care Quality Commission has shown 78% of residential care homeowners own a single home, and around 70% of homes have less than 25 places
- **price discrimination** among care providers who may charge higher fees to self-funders than councils for care of broadly equivalent quality, or for higher quality accommodation with an excessive quality ‘premium’. Various factors enable such price discrimination. For example, moves into residential care often represent a ‘distressed purchase’ for many families that happens very quickly, with little preparation and at a time of emotional upheaval. This means many families may have little knowledge of the price of care or ability to evaluate value-for-money.

In this context, the market research company Laing & Buisson has estimated that the average amount paid by local authorities for residential care in 2012 was around £50-£140 per week below a ‘fair market price’ range, which it calculated using a longstanding ‘fair price’ calculator for residential care.3 This suggests that, on average, self-funders pay at least £50-£140 more per week for residential care than local authorities.

It has been widely observed that the monopsony power of local authorities to exert downward pressure on the residential care fees they pay, as well as price discrimination by providers, sometimes results in a ‘cross-subsidy’ from self-funders to local authorities, whereby the higher fees paid by the former enable the latter to secure lower rates.4

Indeed, it is generally accepted that current local authority ‘usual cost’ rates for residential care assume - and rely on - self-funders paying higher fees, and the operation of price discrimination and cross-subsidies.

2.3. What are ‘top-ups’?

Individuals who are assessed by local authorities as having eligible needs, and whose limited income and wealth qualifies them for support under the means test, will have the majority of their residential care fees paid for by their local authority.

However, individuals in receipt of local authority support for residential care fees are able to choose a more expensive care home if their relatives are willing to pay the additional cost in the form of a third party ‘top-up’.

Top-ups are permitted in order to allow families to contribute to their relative living in a care home that is more expensive than the local authority ‘usual cost’ rate, for example, a home
with larger rooms or a better quality rating. Around 56,000 people in England have their residential care fees topped up in this way.

2.4. What are the rules on top-ups?
The rules governing ‘top-ups’ were set out by the Department of Health in 2004 in a ‘Local Authority Circular’, and seek to protect local authorities, care homes, as well as care users and their families.

The principal rules on top-ups can be summarised as follows:

- A local authority’s ‘usual cost’ rate must always be adequate to procure appropriate accommodation in the local market;

This rule exists to protect care homes and care users by ensuring the fee levels that councils pay for residential care are always adequate to pay for acceptable accommodation.

However, as noted above, it is generally accepted that because of price discrimination and cross-subsidies in the care market, where local authority ‘usual cost’ rates are adequate to pay for acceptable accommodation, this frequently reflects the fact that self-funders are paying more for the care they receive.

- A local authority’s ‘usual cost’ rate must not assume that top-ups are available;

This rule exists to protect care homes and care users, by ensuring local authorities do not take advantage of the potential availability of third party top-ups to reduce the fee levels they offer to pay for a person’s residential care.

- If a local authority cannot procure appropriate care at its ‘usual cost’ rate, the council must pay the extra amount rather than seek top-ups from individuals or their family;

This rule exists to protect care users by ensuring that where places in care homes are in short supply owing to market conditions, it remains the local authority’s responsibility to pay the extra amount required to secure a place in an appropriate care home, rather than relying on family members to make up the difference.

For example, if places in a specialist dementia home are unavailable at the local authority ‘usual cost’ rate for this type of care, it is the responsibility of the authority to pay more to secure a place, rather than seek contributions from families to make up the difference.

- A local authority must never encourage a care home to seek top-ups from the family of an individual;

This rule exists to protect care users by stopping local authorities from pressurising care homes to seek top-ups from family members when it should be the responsibility of the local authority to increase the fees it pays.

- Local authorities should ensure that top-up arrangements are sustainable.

This rule protects local authorities and care users by ensuring that where third party top-up arrangements are created, they are sustainable and there is no risk that a local authority will ultimately have to pay the top-up itself, or that individuals will be compelled to move to another home that charges the local authority ‘usual cost’ rate.

More information on these rules is set out in Appendix 1.

2.5. How are the rules on top-ups being applied?

Although research on the residential care market has established that there are over 50,000 individuals in England who receive local authority support and have top-up fees paid, there has historically been very little data on how the rules on top-ups are being applied or observed by local authorities.
For this reason, during January to February 2013, Independent Age submitted Freedom of Information requests to 152 English local authorities regarding third party top-ups, and undertook a survey of residential care providers. This research found that:

- Most councils are failing to properly record, monitor and regulate the number and level of top-up fees paid in their area. Many top-up fee contracts are in fact negotiated without the knowledge of the council so no one knows the true extent of top-up fee payments in England;
- Since many top-up fee contracts are negotiated without the involvement of councils, they are in no position to fulfil their legal responsibility to ensure that relatives are ‘able and willing’ to pay them;
- Since councils are financially responsible for top-up arrangements - whether they are a party to them or not - many councils are unaware of their financial liability, a particular concern since most care homes reported at least one instance where a relative had struggled to pay a top-up fee;
- There are large variations between councils - and even within councils - in their approach to top-up fees, with some minimising their use and yet others regarding them as normal and routine. In some cases councils appear to have moved between these positions, causing concern and confusion to care homes;
- Few councils are signposting relatives to independent advice and independent financial advice (when relevant) before they sign top-up fee contracts.

Source: Passingham A et al. (2013)

In short, despite the existence of clear rules governing third party top-up arrangements, these rules are not being consistently enforced or monitored. In this context, it appears inevitable that the rules on third party top-ups are not in fact protecting care homes, care users and local authorities as they should be.

For example, it appears highly likely that, in some cases, local authorities are lowering their usual cost rate when top-ups are available, as well as ‘turning a blind eye’ to care homes that seek top-ups from family members.

### 2.6. Conclusion: Top-ups and the residential care market

This chapter has briefly reviewed the residential care market in England, and the operation of price discrimination and third party top-ups.

A key issue is the absence of data. The true extent, nature and value of top-ups is unknown. Similarly, policymakers lack reliable data on the average fees paid by self-funders, the extent of price discrimination at a local or national level, and the extent to which local authority ‘usual cost’ rates assume the presence of cross-subsidy from self-funders.

However, the extent of top-ups in the residential care market will be transformed by the implementation of the Care Bill and the government’s ‘capped cost’ reforms to care funding - recommended by the Commission on Funding of Care and Support.

The details of these changes are set out in the next chapter.
3. The Care Bill and the ‘capped cost’ reforms

This chapter identifies those aspects of the Care Bill and the government’s ‘capped cost’ reforms to care funding in England that will have significant implications for the operation of ‘top-up’ payments.

3.1. The Care Bill: Key measures

As part of the ‘capped cost’ reforms to care funding in England, the Care Bill contains provisions for the creation of ‘Independent Personal Budgets’ and ‘care accounts’ - Clauses 28 and 29, reproduced in Appendix 2.

The Care Bill specifies that:

* **Independent Personal Budgets**
  - When individuals have qualifying needs, but do not qualify for means-tested support because of their income and wealth, they will be given an ‘Independent Personal Budget’, which will be the notional financial value of the care their local authority assesses them as requiring, using its ‘usual cost’ rate;

* **Care accounts**
  - In order to ‘meter’ people’s Independent Personal Budgets over time, local authorities will create individual ‘care accounts’, which will allow people to track their progress toward the ‘cap’ on care costs.

The result of these measures being implemented will be that *every self-funder in residential care will from April 2016 be informed of their local authority’s ‘usual cost’ rate.*

In relation to top-up payments, Clause 30 of the Bill confirms that individuals entitled to local authority support will be able to specify a preference to go into a more expensive home, but local authorities will be able to require a person to pay the additional costs in this situation. In short, *those in receipt of local authority financial support will, as now, be able to live in care homes that charge fees higher than the ‘usual cost’ rate.*

The Bill requires local authorities to meet an individual’s preference for specific accommodation, such as to be in a care home close to a relative.

However, crucially, *the regulations allow both the individual or someone acting on their behalf to make an additional payment to the local authority to cover the difference between the cost of their preferred accommodation, and the amount specified in the personal budget.*

Put simply, *‘self-funder top-ups’ paid by the individual in receipt of local authority support will be allowed.* This represents a significant change to current rules on top-ups.

Finally, it is important to note that where individuals have eligible needs, under Section 13 of the Care Bill, local authorities must, as now, ascertain whether the adult wants to have those needs met by the local authority, i.e. to arrange the person’s care for them. This means that *‘self-funders’ will retain the right to request that local authorities arrange their care and accommodation.*

3.2. What will the Care Bill mean for top-ups?

The Care Bill will result in the creation of a new type of fee payment in the residential care market: ‘self-funder top-ups’.
In a change from current rules, when individuals entitled to local authority financial support for their care costs have a preference to live in a care home with fees above the authority’s ‘usual cost’ rate, the individual themselves - in addition to their family - will be able to make additional payments to cover this difference.

This rule change is necessary for two reasons.

First, self-funders who reach the £72,000 ‘cap’ will be entitled to their local authority ‘usual cost’ rate as a contribution to their care costs. However, many in this group are likely to pay more in residential care fees than the ‘usual cost’ rate. So, to ensure these individuals are not forced to move, or rely on third party ‘top-ups’ in order to remain in their care home, they will be allowed to pay ‘self-funder top-ups’.

Second, ‘self-funder top-ups’ will be necessary because of the increase in 2016 in the Upper Capital Limit of the means test threshold used by local authorities, creating a significant extra group of self-funders in residential care who will become entitled to a financial contribution toward their care costs from their local authority.

3.3. What is the Upper Capital Limit?

As part of a means assessment for determining how much financial support individuals receive, local authorities take into account ‘assessable wealth’, which is wealth that individuals are expected to draw upon in addition to their income in order to pay for their care costs. This approach recognises that even when a person has a relatively low income, they could have a high level of savings or wealth that it is reasonable to expect them to draw upon to fund their care costs.

The value of a person’s home is not treated as ‘assessable wealth’, unless a person has moved out of it and no partner or dependent is living there.

For the purpose of the means test, the value of a person’s savings and assets are converted into notional ‘tariff income’, which is then added to a person’s actual income to determine a total assumed income. Under the ratio used to calculate ‘tariff income’, £250 of assessable wealth is treated as £1 of income per week. For example, £10,000 of assessable wealth is treated as £40 of tariff income per week.

Under current means test rules, tariff income is calculated on a person’s wealth between a Lower Capital Limit of £14,250 and an Upper Capital Limit of £23,250.

3.4. What is happening to the Upper Capital Limit?

Alongside the Care Bill, the government has announced that the Upper Capital Limit will be raised to £118,000 in 2016, and subsequently uprated each year in line with an inflation index. The Lower Capital Limit will be raised to £17,000 in 2016.

The rationale for raising the Upper Capital Limit is to improve the asset protection of the ‘capped cost’ reforms for lower-wealth groups, and therefore the overall distributional impact of the ‘capped cost’ reforms and the additional public spending it requires.

However, it is important to note - as previous analysis by the Strategic Society Centre has shown - despite theoretically representing the threshold of entitlement to financial support, a £118,000 Upper Capital Limit applied in the means test for financial support for residential care costs will likely see few individuals with wealth around this level entitled to support.

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* This is because in 2016, someone with £117,750 of capital (ie just below the new Upper Capital Limit) would have £101,000 of ‘assessable wealth’ (£118,000 minus the raised Lower Capital Limit threshold of £17,000), and would be likely to have total ‘tariff’ and actual income above the local authority’s ‘usual cost’ rate. In this situation, the local authority would take the view that a person has sufficient ‘income’ to meet their assessed care costs. The Strategic Society Centre has estimated that average ‘real’ Upper Capital Limit as a threshold to financial support will be around £90,000 of wealth, and that there will be wide variation in the ‘real’ Upper Capital Limit among the 152 local authorities in England.
3.5. What will be the effect of the raised Upper Capital Limit?

By April 2016, all 175,000 ‘self-funders’ in residential care in England will have been given means assessments. Among those with less than £118,000 in capital, some - but by no means all - will become entitled to a financial contribution from their local authority.

No detailed information on the average wealth of self-funders in residential care in England is available. However, as a ‘proxy’ group, it is useful to describe the wealth of the more than one million people in England in receipt of Attendance Allowance (AA), the principal disability benefit received by older people.

The median equivalised income of AA recipients in England was £253.48 per week in 2010, including the value of AA.10 Median net total wealth among AA recipients was around £127,000.

On this basis, it would be reasonable to estimate that around half of all individuals in residential care in England are likely to be below the raised £118,000 Upper Capital Limit for residential care in April 2016. This represents around 44,000 more people than the current number of individuals just receiving local authority support.

To ensure that those individuals with wealth below £118,000 in 2016 who are entitled to some means-tested council support for their residential care costs are not forced to move home or rely on third party top-ups, the Care Bill enables ‘self-funder top-up’ payments.

3.6. Conclusion: The Care Bill and the Upper Capital Limit

The changes resulting from the ‘capped cost’ clauses of the Care Bill, and the raised Upper Capital Limit described in this chapter, suggest a number of important implications for the residential care market:

• As a result of the ‘cap’ on care costs and raised Upper Capital Limit, more individuals in residential care - including current ‘self-funders’ - will become entitled to means-tested support.

• Individuals in receipt of local authority support for their residential care costs who prefer accommodation that costs more than the authority’s ‘usual cost’ rate will be able to pay ‘top-ups’ themselves, rather than rely on third party payments.

• The reforms will therefore see the creation of a new category of individuals using ‘self-funder top-ups’.

• Overall, there will be a substantial increase in the number of residential care users using some form of top-up.

The next chapter considers what rules should be applied to the use of ‘self-funder top-ups’.
4. Self-funder top-ups

This chapter explores the consequences of the new category of top-up payments - ‘self-funder top-ups’ - that will emerge following the 2016 reforms to care funding in England, and the rules that should be applied to them.

Self-funder top-ups will be top-ups by individuals in receipt of local authority financial support who:

• pay more in care fees than the local authority ‘usual cost’ rate
• have reached and passed the ‘cap’ on care costs; or
• are below the £118,000 Upper Capital Limit.

For the first time, the Care Bill will make these forms of top-ups permissible. The creation of ‘self-funder top-ups’ will mean that from 2016, more individuals in the care system will be using top-ups to fund their care.

This change will have potentially significant implications, as the Department of Health identified in a 2013 consultation document.\(^b\)

Chapter 2 noted that existing rules on third party top-ups are poorly applied, despite seeking to protect care users, care homes and local authorities.

This chapter therefore explores:

• How could existing rules on top-ups be applied to self-funder top-ups?
• What would be the consequences of these rules not applying to self-funder top-ups?
• What will happen in 2016 if local authorities don’t apply rules on top-ups to self-funders?

4.1. Self-funder top-ups: how could existing rules be applied?

Chapter 2 set out the current rules governing the use of third party ‘top-ups’, which variously seek to protect local authorities, care homes, as well as care users and their families.

This section explores how the most pertinent existing third party top-up rules might be applied to self-funder top-ups, and what the implications would be for local authorities.

4.2. A local authority’s ‘usual cost’ rate must not assume that top-ups are available

Currently, this rule seeks to ensure that when determining someone’s Personal Budget, local authorities set their usual cost rate at a fair level that does not assume someone has access to third party top-ups.

\(^b\) The Department of Health noted:

“264. Currently, a person who arranges and pays for their own care can spend as much as they wish on their care. However, where a person receives local authority support they face restrictions on their ability to top up their care fees. This means that in most cases, top-ups will be made by a third party, because the adult’s personal financial circumstances should already have been taken into account in deciding what charges they must pay for their care.

265. We are seeking to better understand the impact of such a relaxation in the restrictions on top-ups. There may be some concerns that vulnerable adults who are receiving care and support could feel forced to top-up, and that some local authorities might seek to use top-ups as a way to keep down costs. Equally there are potential risks to local authority finances, care and support providers or to an adult’s continuity of care if top-ups are used inappropriately. We are keen to hear views on what more should be done to manage these risks in a way that is consistent with giving people greater choice over their care and support.”

Source: Department of Health (2013) Caring for our future - consultation on what and how people pay for their care and support.
However, because of means testing associated with the creation of Independent Personal Budgets for all individuals in residential care, from 2016 local authorities will know that those self-funders entitled to local authority support can afford to pay top-ups.

This will mean that local authorities will be strongly incentivised to set a ‘usual cost’ rate that assumes individuals are willing to pay self-funder top-ups.

4.3. If a local authority cannot procure appropriate care at its ‘usual cost’ rate, the council must pay the extra amount rather than seek top-ups from individuals or their family

This rule seeks to ensure that when local authorities cannot find places in care homes at their usual cost rate, they do not seek top-up payments from family members to pay the additional costs involved.

However, given that self-funder top-ups will be permissible, local authorities will be strongly incentivised to reduce their usual cost rate to the lowest possible amount in the context of their local market, thereby obliging ‘self-funder top-ups’ from individuals.

Put another way, given the additional financial resources available to self-funders who receive local authority support, councils may effectively offer them the cheapest possible appropriate care home as the benchmark for their ‘usual cost’ rate, in order to compel individuals to use their private resources and make up the difference through ‘self-funder top-ups’.

4.4. A local authority must never encourage a care home to seek top-ups from the family of an individual

Adapting this rule to self-funders, should local authorities be allowed to encourage care homes to seek ‘self-funder top-ups’ from individuals?

At present, local authorities effectively compel self-funders to pay ‘top-ups’ through determining ‘usual cost’ rates that ensure care homes seek higher fees from self-funders. As noted in Chapter 2, because of the monopsony power of local authorities and price discrimination by care providers, the higher fees paid by self-funders effectively cross-subsidise local authorities.

As such, applying this rule in 2016 to self-funders who live in ‘mixed’ care homes occupied by both self-funders and council-funded residents, will oblige the local authority to ensure that those entitled to means-tested support do not pay more than the local authority ‘usual cost’ rate.

In effect, those self-funders in ‘mixed’ homes who from 2016 receive some local authority financial contribution and therefore become users of ‘self-funder top-ups’ will have to be moved on to the local authority rate by their care home, which in the vast majority of cases is likely to be lower than their previous fee level.

This change will have significant implications for:

- care providers, their total revenue and financial sustainability
- local authorities, the fee levels they pay and their total expenditure.

4.5. Local authorities should ensure that top-up arrangements are sustainable

At present, this rule exists to ensure that third party top-up arrangements do not collapse, with the result that individuals have to move to a cheaper care home, or that the local authority is compelled to pay more than its ‘usual cost’ rate because someone has moved into a more expensive care home.

However, any self-funder can choose a care home that is more expensive than the local authority ‘usual cost’ rate, which will eventually see them spend down their resources to the
threshold of means-tested support, and ultimately to the point that they are unable to afford their fees from their private resources.

Therefore, applying this rule to self-funder top-ups, or self-funders who may quickly become entitled to means-tested support, would see local authorities having to intervene in private choices.

Applying this rule to self-funder top-ups, it is therefore unclear:

- how local authorities would define sustainability in relation to self-funder top-ups
- whether local authorities could or should intervene in the decisions of self-funders regarding what care home they move to.

This points to the need for clarity from the government around whether local authorities will in future be able to direct self-funders to less expensive care homes that will see them spend down their wealth more slowly.

4.6. What would happen if rules on top-ups did not apply to self-funder top-ups?

The analysis above has explored how existing rules on third party top-ups could be applied to ‘self-funder top-ups’, and the implications of applying these rules, which potentially include significantly increased expenditure for local authorities.

However, what would be the consequences of these rules not applying to self-funders? Such a scenario would:

- enable local authorities to reduce the ‘usual cost’ rate deployed in determining Independent Personal Budgets because they know that self-funders can afford to pay more
- allow local authorities to set the ‘usual cost’ rate at a low level, even when an individual would not be able to procure appropriate care at that rate themselves because of market conditions
- enable local authorities to encourage care homes to charge self-funders higher ‘top-ups’, compared to the ‘usual cost’ rate
- allow local authorities to have no regard to the financial sustainability of ‘self-funder top-ups’.

Collectively, these outcomes would appear unacceptable and unfair, and would undermine the government’s reforms to long-term care funding in England that seek to create a fairer, more transparent settlement.

This suggests that existing rules on third party top-ups will from 2016 need to be applied to self-funder top-ups.

4.7. Self-funders: What will happen in 2016 if local authorities don’t apply rules on top-ups to self-funders?

In exploring whether top-up rules should be applied to self-funder top-ups, and the consequences of not doing so, it is worthwhile noting that for self-funders in ‘mixed’ care homes occupied by self-funders and council-funded care users, if local authorities do not apply rules on top-ups, self-funders may anyway from 2016 secure the ‘usual cost’ rate for themselves.

This is because from 2016 all self-funders in residential care will:

- know their local authority ‘usual cost’ rate
- retain the right to request that their local authority arranges their care for them.

This means that from 2016, where self-funders pay more than the local authority rate for places in a care home also containing council-funded residents, these self-funders will be able to:

- demand that the home places them on the lower, ‘usual cost’ rate
and, where homes refuse, request that the local authority takes over arrangements for their care, thereby procuring a place for the self-funder at the ‘usual cost’ rate.

Importantly, this self-funder group will include individuals below the £118,000 Upper Capital Limit who are only entitled to a partial contribution to their care fees from their local authority, but would previously have paid higher fees that cross-subsidised local authority places.

4.8. Conclusion

This chapter has considered how existing rules on third party top-ups could be applied to the new category of self-funder top-ups from 2016, and the consequence of not doing so. The chapter has also identified that given all self-funders will know the ‘usual cost’ rate from 2016, where local authorities do not apply rules on top-ups, self-funders in ‘mixed’ homes may anyway be able to ensure that they are able to secure the ‘usual cost’ rate.
5. Conclusion: Policy recommendations

This report has analysed and explored the creation of a new category of ‘self-funder top-ups’ from 2016 in England’s care system, and the need to apply rules on top-ups to this new group.

This conclusion sets out key recommendations for policymakers in light of this analysis.

5.1. Existing rules on top-ups must be properly applied

Research on the application of rules on third party top-ups has found them to be poorly and inconsistently applied. This is unacceptable, and the government must do more to ensure that local authorities and residential care providers are applying these rules appropriately.

5.2. Existing rules on top-ups must also be applied to the new category of ‘self-funder top-ups’ that will emerge from 2016

The 2016 reforms will result in the creation of ‘self-funder top-ups’. However, given intense budgetary pressures, local authorities will have strong incentives to abuse the existence of self-funder top-ups in ways that current top-up rules seek to guard against.

For this reason, existing rules on top-ups must also be applied to the new category of self-funder top-ups. The government must ensure that local authorities and residential care providers apply these rules appropriately.

5.3. Applying rules on top-ups to self-funder top-ups will have budgetary implications for local authorities and care providers; the government must review public spending projections and allocations

It is widely accepted that the monopsony power of local authorities and the operation of price discrimination by providers means that the fees of self-funders in residential care cross-subsidise local authorities.

However, in applying current top-up rules to self-funder top-ups, local authorities will by necessity have to eliminate some of this cross-subsidy that exists in the residential care market for care homes occupied by both self-funders and council-funded care users. In effect, some self-funders only entitled to a proportion of the ‘usual cost’ rate as a contribution to their care costs will be nevertheless transferred to ‘usual cost’ fee levels.

This change is likely to put significant pressure on the income of care providers, who in turn will seek higher fees - an increase in the ‘usual cost’ rate - from their local authority.

Given residential care providers have already absorbed downward pressure on fees in recent years in the context of public spending cuts, it is likely that to avoid forcing residential care providers into bankruptcy, local authorities will in fact have to increase their ‘usual cost’ rates.

This suggests that a key consequence of the 2016 care funding reforms and the new category of self-funder top-ups is that local authorities will have to spend more than existing projections allow for in order to fulfil their duties.

The government must therefore review public spending projections for demand for local authority social services budgets following April 2016, and evaluate whether public spending allocations to local government from 2016 need to increase more than currently projected in order to address the growing shortfall between local authorities’ ‘usual cost rates’ for care and fair market prices.
Appendix 1:
Guidance on top-up payments

The rules governing ‘top-ups’ were set out by the Department of Health in 2004 in a ‘Local Authority Circular’. The principal rules on top-ups from this guidance are as follows:

- When setting its usual cost(s) a council should be able to demonstrate that this cost is sufficient to allow it to meet assessed care needs and to provide residents with the level of care services that they could reasonably expect to receive if the possibility of resident and third party contributions did not exist.

In short: a local authority’s ‘usual cost’ rate must always be adequate to procure appropriate accommodation in the local market.

- Councils have a statutory duty to provide residents with the level of service they could expect if the possibility of resident and third party contributions did not exist. Residents and third parties should not routinely be required to make up the difference between what the council will pay and the actual fees of a home.

In short: a local authority’s ‘usual cost’ rate must not assume that top-ups are available.

- Councils should not seek resident or third party contributions in cases where the council itself decides to offer someone a place in more expensive accommodation in order to meet assessed needs, or for other reasons. Where there are no placements at the council’s usual rate, councils should not leave individuals to make their own arrangements having determined that they need to enter residential accommodation and do not have care and attention otherwise available to them. In these instances, councils should make suitable alternative arrangements and seek no contribution from the individual other than their contribution as assessed under the National Assistance (Assessment of Resources) Regulations 1992. 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.

In short: if a local authority cannot procure appropriate care at its ‘usual cost’ rate, the council must pay the extra amount rather than seek top-ups from individuals or their family.

- 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.

In short: a local authority must never encourage a care home to seek top-ups from the family of an individual.

- In order to safeguard both residents and councils from entering into top-up arrangements that are likely to fail, the resident or the third party must reasonably be expected to be able to continue to make top-up payments for the duration of the arrangements. Councils should, therefore, assure themselves that residents or third parties will have the resources to continue to make the required top-up payments.

In short: local authorities should ensure that top-up arrangements are sustainable.
Appendix 2: The Care Bill

28 Independent personal budget
(1) An independent personal budget is a statement which specifies what the cost would be to the local authority concerned (see section 24(3)) of meeting the adult’s eligible needs for care and support.

(2) Where the amount referred to in subsection (1) includes daily living costs, the independent personal budget for the adult must specify - (a) the amount attributable to those daily living costs, and (b) the balance of the amount referred to in subsection (1).

(4) A local authority must - (a) keep under review generally independent personal budgets that it has prepared, and (b) on a reasonable request by or on behalf of the adult to whom an independent personal budget relates, review the independent personal budget.

29 Care account
(1) Where an adult has needs for care and support which meet the eligibility criteria, the local authority in whose area the adult is ordinarily resident or, if the adult is of no settled residence, in whose area the adult is present - (a) must keep an up-to-date record of the adult’s accrued costs (a care account), and (b) once those costs exceed the cap on care costs, must inform the adult.

(4) A local authority which is keeping a care account must, at such times as regulations may specify, provide the adult concerned with a statement which - (a) sets out the adult’s accrued costs, and (b) includes such other matters as regulations may specify.

30 Cases where adult expresses preference for particular accommodation
(1) Regulations may provide that where - (a) a local authority is going to meet needs under sections 18 to 20 by providing or arranging for the provision of accommodation of a specified type, (b) the adult for whom the accommodation is going to be provided expresses a preference for particular accommodation of that type, and (c) specified conditions are met, the local authority must provide or arrange for the provision of the preferred accommodation.

(2) The regulations may provide for the adult or a person of a specified description to pay for some or all of the additional cost in specified cases or circumstances.

(3) “Additional cost” means the cost of providing or arranging for the provision of the preferred accommodation less that part of the amount specified in the personal budget for the purposes of section 26(1)(a) that relates to the provision of accommodation of that type.
Appendix 3: The income and wealth of Attendance Allowance (AA) recipients

The median equivalised income of AA recipients in England was £253.48 per week in 2010, including the value of AA.

The income and wealth of Attendance Allowance (AA) recipients

Median net total wealth among AA recipients was around £127,000, as the following chart shows.
References
