

Managing Provider Failure Procedure

December 2014

This document provides an overview of:

- What constitutes provider failure under the Care Act 2014
- What constitutes service interruption under the Care Act 2014
- How to identify potential failure and mitigate it

And procedures for:

- What to do in the event of provider failure
- What to do in the event of service interruption

It is written in line with:

- *Sections 19 and 48 to 57 of the Care Act 2014;*
- *The Care and Support (Business Failure) (England and Wales and Northern Ireland) Regulations 2014;*
- *The Care and Support (Market Oversight Criteria) Regulations 2014;*
- *The Care and Support (Market Oversight Information) Regulations 2014.*

It should be read in conjunction with the DH Care Act Guidance Chapter 5, 2014 (Appendix A).

1. Introduction

The possibility of interruptions to care and support services causes uncertainty and anxiety for the person receiving services, their carers, family and friends. This procedure follows the Care Act, to ensure that Rutland County Council meets the duty we have to make provision to ensure that the care and support needs of those receiving the service continue to be met in circumstances of service failure or interruption. It explains how RCC must exercise and discharge its powers and duties.

This guidance covers all services, including but not limited to: residential care; day centres; supported living; and other statutory and non-statutory support services. *All services should be considered under this guidance.*

2. Definitions

The following definitions are taken direct from the Care Act guidance.

Business failure

is defined in the Care and Support (Business failure) (England and Wales and Northern Ireland) Regulations 2014. Business failure is defined by a list of different events such as the appointment of an administrator, the appointment of a receiver or an administrative receiver; or the appointment of a liquidator (for the full list see Appendix B). Service interruption because of “business failure” relates to the whole of the regulated activity and not to parts of it.

Temporary duty or duty

means the duty on local authorities to meet needs in the case of business failure. “Temporary” means the duty continues for as long as the local authority considers it necessary. The temporary duty applies regardless of whether a person is ordinarily resident in the authority’s area. The duty applies from the moment the authority becomes aware of the business failure. The actions to be taken under the duty will depend on the circumstances, and may range from providing information on alternate providers, to arranging care and support itself.

3. Service interruptions because of business failure

Local authorities are under a **temporary duty** to meet people’s needs when a provider is unable to continue to carry on the relevant activity in question because of business failure – regardless of whether the provider is under the CQC Market Oversight Regime or not.

The duty applies when a service can no longer be provided **and** the provider’s business has failed. If the provider’s business has failed but the service continues to be provided then the duty is not triggered.

The needs that must be met are those being met by the provider immediately before the provider became unable to carry on the activity.

The duty is for the needs to be met but it is for the Local Authority to decide how that is done. It is not necessary to meet those needs through exactly the same combination of services that were previously supplied.

The decision of how to meet the needs must be made in conjunction with the individual concerned, their carer(s), and/or anyone else that the individual requests to be involved.

- Where the person lacks capacity, the local authority must involve anyone who appears to be interested in the person's welfare.
- Where a carer's service is involved, local authorities must involve the carer and anyone the carer asks the authority to involve. The authority must take all reasonable steps to agree how needs should be met with the person concerned.

The authority should act promptly to meet individuals' needs. The lack of any assessment **must** not be a barrier - it is not necessary to complete those assessments before or whilst taking action.

Authorities **must** meet needs irrespective of whether those needs would meet the eligibility criteria. All people receiving services in the local authority's area must be treated the same. Where someone is ordinarily resident or how they usually pays for the costs of their support must have no influence on whether the authority fulfils the duty.

4. Business failure involving a provider in the CQC oversight regime

The Care and Support (Market Oversight Criteria) Regulations 2014 set out the criteria for which providers fall within the CQC oversight regime. The CQC will determine which providers satisfy the criteria.

If there is a significant risk to the financial sustainability of the provider's business, the CQC may take action.

The CQC is required to tell the local authorities which it thinks will be required to carry out the temporary duty, so that they can prepare for the local consequences of the business failure. When and how to involve local authorities is a decision for CQC in the light of what it considers is the best course of action to maintain continuity of care for service users.

The CQC may work with the affected local authorities to help them fulfil their temporary duty. CQC guidance on market oversight function will explain how it will work with authorities in such situations (*forthcoming – when available will be Appendix C*).

5. Business failure involving a provider not in the CQC oversight regime

Business failure will usually involve an official being appointed (e.g. an Administrator) to oversee the insolvency proceedings. An Administrator will try to rescue the company as a going concern and therefore the service will usually continue to be provided, and the exercise of local authorities' temporary duties may not be called for.

The local authority should cooperate with an Administrator if requested. Local authorities should, as long as it does not adversely affect people's wellbeing, support efforts to maintain service provision.

6. Service interruptions other than business failure

Care Act Sections 18 and 20 set out when a local authority must meet a person's eligible needs. These duties apply whether or not business failure is at issue. Temporary duty applies in addition where the local authority is not already required to meet needs.

Care Act Section 19 covers the circumstances where care and support needs may be met, where no duties arise under section 18 but the local authority may meet an adult's needs anyway. In particular, Section 19(3) permits a local authority to meet needs which appear to it to be urgent. This is may be the case in situations where services are interrupted but business failure is not the cause.

Section 19(3) gives local authorities a power to meet urgent needs without having first conducted a needs assessment, financial assessment or eligibility criteria determination. The local authority may meet urgent needs regardless of whether the adult is ordinarily resident in its area. This means the local authority can act quickly if circumstances warrant. This section it does not **require** that authorities must act.

Local authorities might exercise of the power where the continued provision of care and support to those receiving services is in imminent jeopardy and there is no likelihood of returning to "business as usual" in the immediate future, leading to urgent needs.

Not all situations where a service has been interrupted or closed will merit local authority involvement because not all cases will result in adults having urgent needs. Whether to act under this power is a judgement for the local authority to make in the first instance.

If a provider has not failed, it is the provider's responsibility to meet the needs of individuals receiving care in accordance with its contractual liabilities. The power provides for where the provider cannot or will not meet its responsibilities, and where the authority judges that the needs of individuals are urgent.

Where the local authority does get involved in ensuring needs continue to be met, that involvement might be short-lived or enduring over some months.

It is for the local authority to decide if it will act to meet a person's needs for care and support which appear to it to be urgent. It must act lawfully, taking decisions that are reasonable.

7. Assessing and Mitigating Risk

There are a number of forms of risk which may lead to provider failure either at a whole provider level or on an individual service basis.

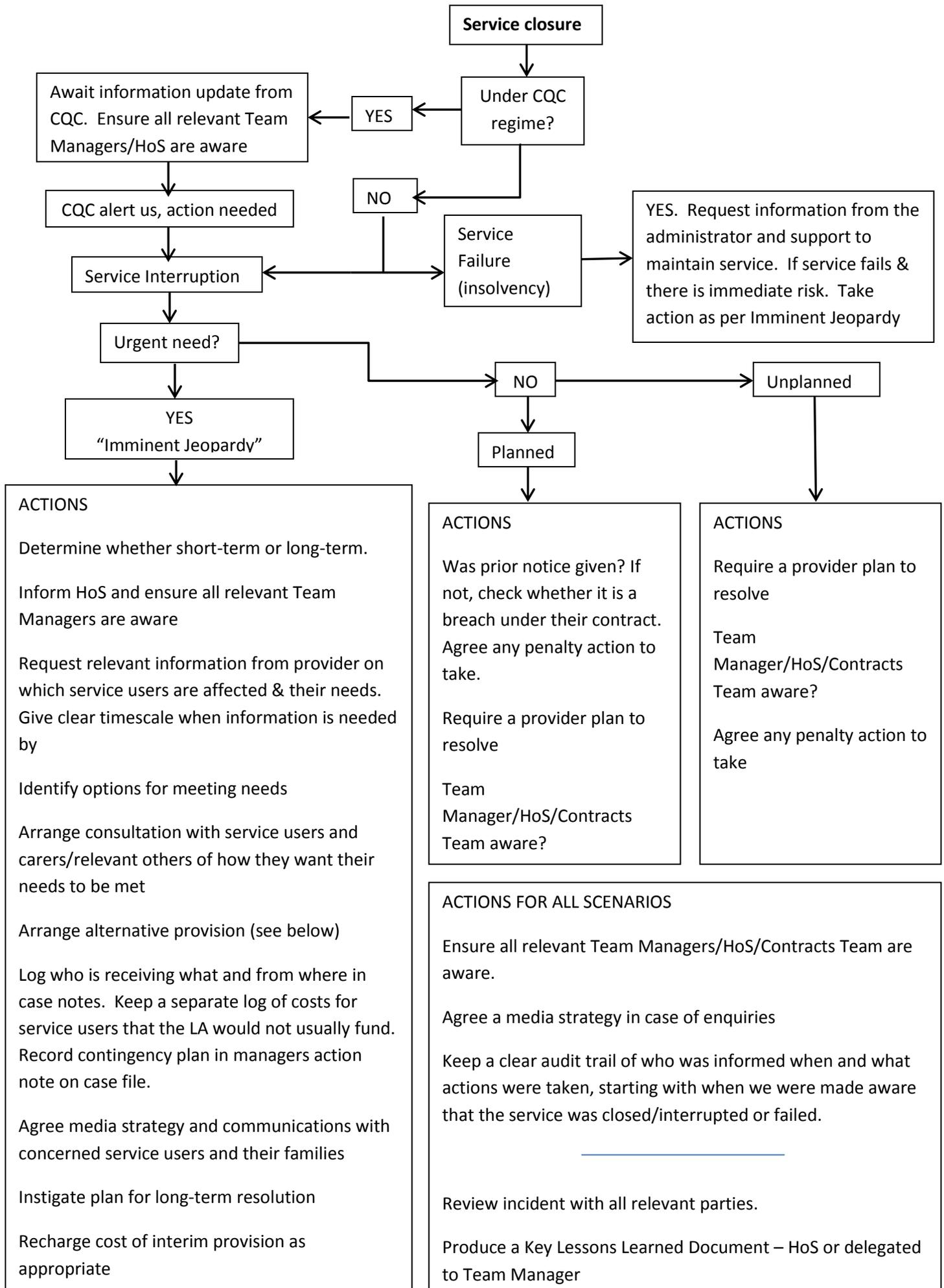
1. Financial - eg. High vacancy levels; escalating running costs.
2. Quality drivers – eg. safeguarding notifications; serious untoward incidents
3. Personalisation – eg. service user choice leading to vacancy levels
4. Market – eg. high number of providers vying for the same service users; staffing issues

Currently information on all of these is collated where it comes to the notice of the Council by the Contracts Team. The Contracts Team will be responsible for monitoring and maintaining

a database to ensure that risks and concerns with providers are flagged to the relevant Team Manager and Head of Service. For residential care providers, this is logged on the Risk Management Framework, which acts as the mechanism for identifying risk.

Agreement between the Contracts Team Manager and the Head of Service/relevant Team Manager must be reached on any course of action to address risks. In the first instance, actions to mitigate the risk should be sought from the service provider. Where the provider is under the CQC regime, risks and any requests for action should be flagged to the CQC.

8. Action to be Taken in the event of Risk of Service Failure



Where action needs to be taken because of imminent jeopardy, there are a number of different options that could be taken dependent on the circumstances. Examples of these:

- identifying support that we can directly give to the provider in order to mitigate risk and prevent the issue escalating, including placing our staff directly in the provider's service to deliver services and/or support managers
- working with neighbouring authorities to pool staff to place within a service provider as above
- working with neighbouring authorities to use their service provision as short-term support
- checking vacancies at other providers to identify where service users can be moved to, either short- or long-term, and negotiating bed spaces/day spaces in this provision
- gathering information on self-support provision or alternative services that service users can self-refer to, and providing this to service users either directly or via the failing service provider
- identifying internal staff who can work directly with service users on a short-term basis to assist them in self-referring to alternative provision

The exact actions undertaken will be dependent on the circumstances.

The interventions that we put in as a local authority should be to mitigate risk to service users, based on our assessment of their immediate care and support needs. We must ensure that we do not allow providers to absolve their responsibility to manage their risk by our interventions.

Appendix A – Care Act Guidance: Chapter 5. Managing provider failure and other service interruptions

The full document can be found here:

https://s3-eu-west-1.amazonaws.com/media.dh.gov.uk/network/497/files/2014/05/05_guidance_Managing-provider-failure.pdf

Appendix B – Definition of Business Failure under Care and Support (Business failure) (England and Wales and Northern Ireland) Regulations 2014

The following constitute business failure under Care and Support (Business failure) (England and Wales and Northern Ireland) Regulations 2014¹:

Business failure – England, Wales and Northern Ireland

(2) Where a provider is not an individual, business failure means that, in respect of that provider,—

- (a) an administrator is appointed;
- (b) a receiver or an administrative receiver is appointed;
- (c) a resolution for a voluntary winding up without a declaration of solvency is passed;
- (d) a liquidator is appointed;
- (e) a winding up order is made by a court;
- (f) a members' voluntary winding up becomes a creditors' voluntary winding up under section 96 of the 1986 Act or Article 82 of the Insolvency (Northern Ireland) Order 1989 (f);
- (g) an order by virtue of Article 11 of the Insolvent Partnerships Order 1994 (joint bankruptcy petition by individual members of insolvent partnership)(g) is made;
- (i) administration moves to winding up pursuant to an order of a court; or
- (j) the charity trustees of the provider become unable to pay their debts as they fall due.

(3) In relation to a provider who is an individual, business failure consists of the individual being adjudged bankrupt.

(4) For the purposes of paragraph (2)(j), a person is a charity trustee of a provider if—

- (a) the provider is a charity that is unincorporated; and
- (b) the person is a trustee of that charity.

(5) For the purposes of that paragraph, the charity trustees of a provider are to be treated as becoming unable to pay their debts as they fall due if—

- (a) a creditor to whom the trustees are indebted in a sum exceeding the relevant amount then due has served on the trustees a written demand requiring the trustees to pay the sum so due and the trustees have for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- (b) in England and Wales, execution or other process issued on a judgment, decree or order of a court in favour of a creditor of the trustees is returned unsatisfied in whole or in part;

¹ Only those relevant have been included, references to specific statute for Northern Ireland and Wales have been removed.

Appendix C – CQC Guidance on Market Oversight Function.

Forthcoming - To be added when available, expected January 2015

Appendix D – Section 18 of the Care Act Duty to meet needs for care and support.

(1) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if— .

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, .

(b) the adult's accrued costs do not exceed the cap on care costs, and .

(c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met. .

(2) Condition 1 is met if the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are at or below the financial limit. .

(3) Condition 2 is met if— .

(a) the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are above the financial limit, but .

(b) the adult nonetheless asks the authority to meet the adult's needs. .

(4) Condition 3 is met if— .

(a) the adult lacks capacity to arrange for the provision of care and support, but .

(b) there is no person authorised to do so under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.

(5) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if— .

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, and .

(b) the adult's accrued costs exceed the cap on care costs. .

(6) The reference in subsection (1) to there being no charge under section 14 for meeting an adult's needs for care and support is a reference to there being no such charge because— .

(a) the authority is prohibited by regulations under section 14 from making such a charge, or .

(b) the authority is entitled to make such a charge but decides not to do so. .

(7) The duties under subsections (1) and (5) do not apply to such of the adult's needs as are being met by a carer.

Appendix E - Section 19 of the Care Act: The power to meet needs for care and support.

(1) A local authority, having carried out a needs assessment and (if required to do so) a financial assessment, may meet an adult's needs for care and support if— .

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, and .

(b) the authority is satisfied that it is not required to meet the adult's needs under section 18. .

(2) A local authority, having made a determination under section 13(1), may meet an adult's needs for care and support which meet the eligibility criteria if— .

(a) the adult is ordinarily resident in the area of another local authority, .

(b) there is no charge under section 14 for meeting the needs or, in so far as there is such a charge, condition 1, 2 or 3 in section 18 is met, and .

(c) the authority has notified the other local authority of its intention to meet the needs. .

(3) A local authority may meet an adult's needs for care and support which appear to it to be urgent (regardless of whether the adult is ordinarily resident in its area) without having yet— .

(a) carried out a needs assessment or a financial assessment, or .

(b) made a determination under section 13(1). .

(4) A local authority may meet an adult's needs under subsection (3) where, for example, the adult is terminally ill (within the meaning given in section 82(4) of the Welfare Reform Act 2012). .

(5) The reference in subsection (2) to there being no charge under section 14 for meeting an adult's needs is to be construed in accordance with section 18(6).

Appendix F – Section 20 of the Care Act Duty and power to meet a carer's needs for support.

(1) A local authority, having made a determination under section 13(1), must meet a carer's needs for support which meet the eligibility criteria if— .

(a) the adult needing care is ordinarily resident in the local authority's area or is present in its area but of no settled residence, .

(b) in so far as meeting the carer's needs involves the provision of support to the carer, there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1 or 2 is met, and .

(c) in so far as meeting the carer's needs involves the provision of care and support to the adult needing care— .

(i) there is no charge under section 14 for meeting the needs and the adult needing care agrees to the needs being met in that way, or .

(ii) in so far as there is such a charge, condition 3 or 4 is met. .

(2) Condition 1 is met if the local authority is satisfied on the basis of the financial assessment it carried out that the carer's financial resources are at or below the financial limit. .

(3) Condition 2 is met if— .

(a) the local authority is satisfied on the basis of the financial assessment it carried out that the carer's financial resources are above the financial limit, but .

(b) the carer nonetheless asks the authority to meet the needs in question. .

(4) Condition 3 is met if— .

(a) the local authority is satisfied on the basis of the financial assessment it carried out that the financial resources of the adult needing care are at or below the financial limit, and .

(b) the adult needing care agrees to the authority meeting the needs in question by providing care and support to him or her. .

(5) Condition 4 is met if— .

(a) the local authority is satisfied on the basis of the financial assessment it carried out that the financial resources of the adult needing care are above the financial limit, but .

(b) the adult needing care nonetheless asks the authority to meet the needs in question by providing care and support to him or her. .

(6) A local authority may meet a carer's needs for support if it is satisfied that it is not required to meet the carer's needs under this section; but, in so far as meeting the carer's needs involves the provision of care and support to the adult needing care, it may do so only if the adult needing care agrees to the needs being met in that way. .

(7) A local authority may meet some or all of a carer's needs for support in a way which involves the provision of care and support to the adult needing care, even if the authority would not be required to meet the adult's needs for care and support under section 18. .

(8) Where a local authority is required by this section to meet some or all of a carer's needs for support but it does not prove feasible for it to do so by providing care and support to the adult needing care, it must, so far as it is feasible to do so, identify some other way in which to do so. .

(9) The reference in subsection (1)(b) to there being no charge under section 14 for meeting a carer's needs for support is a reference to there being no such charge because— .

(a) the authority is prohibited by regulations under section 14 from making such a charge, or .

(b) the authority is entitled to make such a charge but decides not to do so. .

(10) The reference in subsection (1)(c) to there being no charge under section 14 for meeting an adult's needs for care and support is to be construed in accordance with section 18(6).