

The Law & Transition

A briefing on forthcoming and recent developments relating to transition



This briefing is one of a series of resources produced for the London JIP Transition Project .
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This briefing note includes an overview of recent or forthcoming changes in the following areas;

1. Policy and legislative developments around personal budgets and direct payments
2. Green Paper and Children and Families Bill
3. Reform of adult social care - Caring for our future white paper and draft Care and Support Bill
4. Apprenticeships
5. Changes in funding for young people with 'high needs' in post-16 education
6. Report of Children and Young People's Health Outcome Forum

1. **Policy and legislative developments around personal budgets and direct payments**
2. Roll-out of **personal budgets and direct payments for social care**, including:-
 - a. ambitious targets for every service user to be in receipt of a personal budget and increase take-up of direct payments
 - b. amendments to direct payments legislation (2009)¹ to provide direct payments to people lacking capacity to manage them, through a family member or other 'suitable person' managing them on their behalf (usually unpaid)
3. Pilots of **Individual Budgets for families with disabled children** - These were originally commissioned by the former DCSF to run in 6 local authority areas, from April 2009 to March 2011, and intended to draw together social care, health, education and other funding streams, with a view to giving disabled children and their families more choice and control over the delivery of their support package, and achieving improved outcomes. This was then extended in May 2011 to run for an additional year, to test how they could broaden their offer to include education and health funds/services into the IB package - the evidence being that to date packages included only or largely social care funding, other than very specific items or nominal amounts of money for health or education.
4. Pilots of **personal health budgets**, including some focused on their use for long-term health conditions and continuing health care
5. Pilots of **direct payments for special educational provision** (introduced into law by the Education Act 2011)
6. Announcement in 2012 that from April 2014 all people with continuing healthcare needs will have the **right to request a personal health budget**
7. Announcement in 2012 that all families of children with a Health, Education and Care Plan (see below) will have the right to request a personal budget for the SEN and care support covered within it

¹ Health and Social Care Act 2008 (amending Health and Social Care Act 2001); *Guidance on direct payments for community care, services for carers and children's services: England 2009*

2. Green Paper and Children and Families Bill

The Green Paper *Support and aspiration: A new approach to special educational needs and disability* (published March 2011) proposed extensive reforms to the system of support for young people with SEN and disabilities and their families, aimed at focusing on better life outcomes beyond school or college.

Key proposals in the Children and Families Bill related to transition include the following:-

- Replacement of statutory assessments of SEN and learning difficulty assessments with a **single birth to 25 assessment process**; statements of SEN will be replaced by birth-25 **Education, Health and Care Plans**. This is to take place by 2014.
- The Education, Health and Care Plan will provide **statutory protections comparable to those currently associated with a statement of SEN** to young people aged 16-25 while they are in school or further education.
- Every local area will be required to have a **local offer**, setting out the services available to support children and young people from birth to 25 and the provision that is normally made available in an area, including schools and colleges.
- Increased use of **personal budgets and direct payments** to improve choice and control for children, young people and their families

Since publication of the Green Paper, twenty pathfinders (covering 31 local authorities and their PCT partners) have been appointed to trial the main proposals within the Green Paper, some of which have been focussing on transition, within the 'Preparing for Adulthood' programme.

Pathfinders are working within the existing statutory frameworks, including the developments mentioned above, such as piloting of SEN direct payments and Individual Budgets. However not all pathfinder authorities have been approved to pilot Individual Budgets, and conversely some authorities that have been approved to pilot Individual Budgets are not among the pathfinders. There is no national blueprint for how things should be done, pathfinders have relative freedom to design and test new arrangements in partnership with parents, schools and colleges, voluntary sector partners and other stakeholders.

All the pathfinders are testing core elements of the proposals, including:-

- a multi-agency approach to assessment and planning
- links between support planning and strategic commissioning particularly through Health and Well Being Boards

- focus on outcomes in a single plan
- portability of social care support across area boundaries, and
- exploring use of personal budgets and direct payments.

There are also optional test areas that some pathfinders have chosen to focus on, including:-

- development of a **national banded framework for funding high-cost provision for children and young people with SEN or who are disabled** (only 4 pathfinders have been exploring this)
- exploring how best to support parents from different backgrounds
- young people going through transition (with a focus particularly on those moving towards employment)
- other particular groups such as looked after or other vulnerable children and young people

In May 2012, following consultation, the Government published *Progress and next steps*, setting out a timetable for introducing legislation to implement the changes to the law required for the green paper reforms, including introduction of the proposed Children and Families Bill to Parliament in early 2013, with implementation from mid-2014 onwards.

At the same time the Government announced funding of £3 million for pilots of supported internships at 14 colleges around England for young people aged between 16 and 25 who have complex learning difficulties or disabilities. These are described as structured study programmes, based at an employer, with on the job training and support from 'job coaches', that are designed to equip young people with the skills they need for the workplace.

In September, draft clauses for the SEN and disability section of the Children and Families Bill were published.

On 19 October 2012 the Pathfinder Support team published three interim evaluation reports on the pathfinders and the Individual Budget Pilots:

- The pathfinder evaluation:
The original timeframe had anticipated that by this stage testing of assessment and planning processes and proposals such as personal and banded funding would be well advanced and authorities would be ready to put forward their local offers and EHC Plans. However the interim evaluation has indicated that most pathfinders are only part way through developing the necessary infrastructure to deliver new approaches, and there was still some distance to go for pathfinder learning to fully inform

development of the legislation and support national implementation of the reforms.

- Two reports on the Individual Budget Pilot:
 - An update on the original cohort of families that participated in the Individual Budget pilot 12-18 months after starting to receive IB payments
 - A report on the 'Extended Packages', those pilot sites which sought to broaden their IB offer to include both education and health funding, and the challenges associated with this.

The overview of these two reports indicates a similarly limited level of progress, with problems including 'challenges around disaggregating health/education budgets; and a lack of understanding/commitment and capacity on the part of health/education staff to get involved'. Half of the pilot sites failed to get health budgets operational during the extended year of the pilot, and overall the sites reduced their ambitions considerably in the course of the extended year, reverting to their existing social-care based IB approach or at most developing discrete and small-scale trials of extended health or education IB packages.

2. Raising the participation age (RPA)

The Education and Skills Act 2008 places a legal requirement on young people to stay on in education or training until the age of 18. This may be in:-

- full-time education
- an apprenticeship
- part-time education or training if the young person is employed or volunteering.

This is being introduced in two stages:

- Requirement to participate until the end of the academic year in which a young person turns 17 will be introduced in 2013 (i.e. those entering Year 11 in September 2012 will have a legal duty to be in education or training for a following year after they would previously have finished compulsory schooling); young people with statements will have already had their Year 9 Transition Review which should have had RPA built into the planning.
- Requirement to participate until the young person has turned 18 will be introduced in 2015.

Under the Act, local authorities will have a corresponding duty to promote the effective participation of young people in their area and make arrangements to identify those who are not participating.

3. Reform of adult social care - *Caring for our future* white paper and draft Care and Support Bill

Consultation on the draft Bill closed on 19 October 2012. Draft legislation is due to be introduced to Parliament in 2013.

Politically there has been a predominant focus on changes to care for older people, not on younger disabled people. One of the main headlines has been that the recommendations of the Dilnot Commission on the balance to be struck between state and individual responsibility for funding care are broadly accepted in principle but not to be implemented now because of affordability problems. The overall context of uncertainty about the funding of future adult social care is of major importance for young people with disabilities approaching transition, who are potentially among the most vulnerable to budget cuts as their services are newly commissioned.

White Paper:

- Vision statement emphasis (remarkably similar to 2008 policy circular *Transforming social care*) on:
 - promoting independence and well-being by enabling people to prevent or postpone the need for care and support
 - putting people's needs, goals and aspirations at the centre of care and support
 - supporting people to make their own decisions, realise their potential, and pursue life opportunities
 - National minimum eligibility threshold to be introduced from 2015
 - National minimum eligibility threshold to be set for carers' support
- Few of the proposals come with specific promises of new money attached.

Key features of the draft Bill:

- Intention to **consolidate guidance into 'a single, unified suite...** as is used in children's services'.
- Some provisions previously found in guidance will be incorporated into regulations - eg clause 12 requires regulations to be made on certain matters relating to assessment, including specifying to whom a copy of the assessment must be given

- **Assessment and eligibility:** Duty to:-
 - assess on appearance of need,
 - determine whether any of the needs identified in the assessment meet the eligibility criteria, and
 - meet eligible needs,

- BUT:
 - duty to assess now triggered when it comes to the local authority's attention that a person may be in need of 'care and support', not 'community care services'
 - no prescribed set of services to meet needs, but a non-exhaustive list of the ways that the local authority might go about doing so, for example, by providing information and advice - may result in more *McDonald*-type² disputes about whether or not the council's proposals for meeting need are in fact adequate to do so

- **New overarching statutory principle: general duty to promote the individual's well-being** when exercising any function under the new legislation (clause 1)
 - Well-being includes not only physical and mental health, but also social and economic well-being, family and personal relationships and 'control by the adult over day-to-day life (including over the care and support provided to the adult and the way in which it is provided)'
 - Accompanying notes indicate that a 'failure to follow the principle' will be challengeable by way of judicial review

- Other new general duties on local social services authorities, to implement some of the policy priorities:-
 - to **establish an information and advice service** relating to care and support including the choice of providers in the area (clause 2)
 - to **promote diversity and quality in service provision** in their area (clause 3)
 - to **co-operate generally with relevant partners**, including NHS bodies (clause 4)
 - to **co-operate with relevant partners in relation to individual cases**, unless it would be incompatible with their own duties - written reasons must be given for refusing a request made in relation to an individual case (clause 5)
 - to **provide 'services, facilities or resources' to contribute towards preventing or delaying the development of needs for care and support or reducing such needs** (clause 7) - arguably akin to s17 Children Act services

² *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, 6 July 2011)

- Regulation-making power in relation to setting of a **national minimum eligibility threshold** (clause 13)
- Right to a **care and support plan**, or a **support plan** in the case of a carer
- **Right to be consulted** on the care and support plan (clause 9(5))
- **Right to a personal budget**
 - Budget is to be specified in the care and support plan (clause 24)
 - A 'personal budget' is defined as 'a statement which specifies:-
 - a) the amount which the local authority assesses as the cost of meeting those of the adult's needs which it is required or decides to meet...
 - b) the amount which, on the basis of the financial assessment, the adult must pay towards that cost, and
 - c) if on that basis the local authority must itself pay towards that cost, the amount which it must pay'
 - Conflict with previous definitions (eg In Control), which also include as fundamental the notion that the individual should have choice and control over how the budget is spent
 - But arguably the overarching statutory principle may convert the right to be consulted into a **right to decide** - because of inclusion in definition of well-being of 'control by the adult...over the care and support provided to the adult and the way in which it is provided'
- A **portability scheme** (clause 31): this requires the 'sending authority' to notify the 'receiving authority' that an adult receiving care and support intends to move into the receiving authority's area. The receiving authority must then carry out assessments, but if it has not completed the process by the day of the move, it must meet the person's needs (and any carer's needs) that were being met by the sending authority. Doesn't apply where there is an out-of-area residential placement - ordinary residence is retained in the sending authority's area.
- **Carers' assessments and services** (clause 10): Carers are to be given equivalent rights to service users, including assessment, eligibility for services based on eligibility criteria, and support planning with a personal budget. The new assessment right no longer requires an intention to undertake a substantial and regular amount of care.
- **Safeguarding Adult Boards** to be put on a statutory footing (clause 35): Will have a co-ordinating and policy role and be required to carry out serious case reviews (clause 36)

- **Duty to carry out enquiries** to enable a decision to be made on whether or not any action should be taken in any individual case, including the provision of care and support (clause 34)
- **Duty to make arrangements to meet the assessed needs of a self-funder** (service user or carer) if asked to do so. Can charge for the making of the arrangements unless the self-funder lacks capacity to do so themselves and there is no one in a position to do so on their behalf. (Duty continues to carry out an assessment irrespective of financial circumstances.)
- **General power to delegate functions in the bill** (except ones specifically excluded under clause 51) and under Mental Health Act 1983 s117 to any person, not just another statutory authority. This will allow contracting out of, among other things, eligibility decisions. The local authority will retain legal responsibility; however this is likely to lead to less transparency and may undermine accountability.

4. Apprenticeships

A Government-commissioned report by Peter Little OBE published in May 2012 highlighted key barriers to apprenticeship for young people with LDD and made a series of recommendations which the Government has committed to an action plan for taking forward, including the following:-

- making the assessment process for functional skills more flexible and ensuring that reasonable adjustments are made
- better promotion of Access to Work to employers
- funding apprentices with LDD aged 19-24 at the same 100% rate as those aged 16-18.

5. Changes in funding for young people with 'high needs' in post-16 education

From September 2013 there will be a complete change in the way support for young people with LDD is funded. All mainstream post-16 education providers (including school sixth-forms and FE colleges) will be expected to contribute the first £6,000 of the additional education support costs of young people with LDD - this is over and above the costs of per-pupil or per-student teaching and learning provided by the educating institution. Providers will receive this additional allocation of £6,000 for each high needs student on roll in the previous full academic year, on top of the per-student allocation calculated by the national 16-19 funding formula. Similarly, post-16 settings will get a per-student allocation

calculated by the national 16-19 funding formula plus an additional £6,000 per high needs pupil based on the last full academic year.

Funding for support above this £6,000 threshold will now be provided by the local authority out of what will be known as the 'high needs block'. The high needs block will be held by local authorities and will include the funding previously held centrally by the Young People's Learning Agency, including Higher-Level Additional Learner Support (ALS), the SEN block grant and the LLDD specialist placement budget. This will be a significant change in that providers will now be required to negotiate funding with local authorities to determine the 'top-up' that needs to be made out of the high needs block for each individual with high support needs.

6. Report of Children and Young People's Health Outcome Forum

The Government has indicated that the recommendations of this independent forum, announced on 26 July 2012, together with the early findings from the pathfinder programme and development of the EHCP, are to inform legislative change on healthcare for children and young people. Recommendations relating to transition include the following:-

1. The Dept of Health to include a new outcome in the *NHS Outcomes Framework* to ensure that effective and healthy transitions take place between child-centred and adult-centred health care
2. The Royal College of Physicians to work with the Royal College of Paediatrics and Child Health and other Colleges to develop a plan, by 2014, to ensure that health outcomes and the experience for transition are improved
3. NICE to produce a Quality Standard for age and developmentally appropriate care of teenagers and young adults, including through transition
4. With immediate effect, all data about children and young people to be presented in five-year age bands through childhood and the teenage years. This will allow relevant international comparisons of key outcomes as well as national or local comparisons of outcomes at significant transition points, such as joining secondary school and transition to adult life