



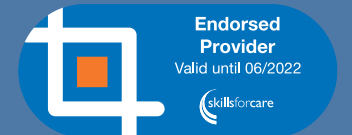
Direct Payments

Direct Payment Workshop
For the Parent and Carer Alliance CIC

Oct '22



Mark Bates Ltd
THE HOME OF PREMIER CARE



Workshop Contents

- Introduction
- DP Employers legal obligations
- A brief history of Direct Payments (DP)
- Direct Payment legislation
- What to do if you're not happy with a decision





Independent Living Group

Introduction



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Using A Direct Payment To Employ

Benefits



Barriers



Employers Legal Obligations

**Legal
Obligation**

**To have Employers
Liability Insurance?**

Best Practice

Best Practice

**Legal
Obligation**

Employers' liability Insurance enables an employer to meet the cost of a compensation claim in the event that an employee is injured or becomes ill at work.

**Legal
Obligation**

**To have Public Liability
Insurance?**

Best Practice

Best Practice

**Legal
Obligation**

Public liability provides cover if a third party (not an employee) suffers injury or damage to their person or property for which an employer is held legally responsible.

**Legal
Obligation**

**To pay staff the
national minimum
wage or above?**

Best Practice

Best Practice

**Legal
Obligation**

23 and over
"National Living Wage"

£9.50 (April 2022)

21 to 22

£9.18

18 to 20

£6.83

Under 18

£4.81

Apprentice

£4.81

Living Wage Foundation – “Real Living Wage”

Paying the Recommended Living Wage is not a legal requirement. The figure is recommended by the Living Wage Foundation based on the cost of living. New rates are normally announced in Autumn.



Announced	London	Rest of UK
Sep 2022	£11.95	£10.90
Nov 2021	£11.05	£9.90
Nov 2020	£10.85	£9.50
Nov 2019	£10.75	£9.30
Nov 2018	£10.55	£9.00
Nov 2017	£10.20	£8.75
Nov 2016	£9.75	£8.45
Nov 2015	£9.40	£8.25
Nov 2014	£9.15	£7.85

Legal
Obligation

To keep employees
safe and well at work?

Best Practice

Best Practice

Legal
Obligation

Employers should maintain a safe work environment and talk to their employees about health and safety.

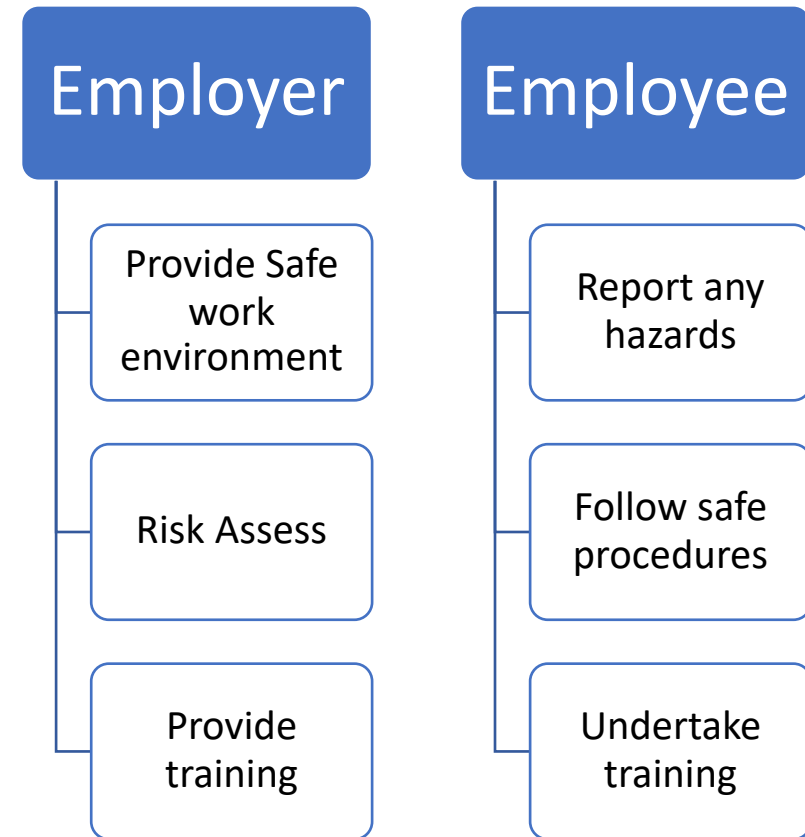
Health and Safety at work is regulated by the **Health and Safety Executive (HSE)**.

Health & Safety

Health and Safety in the UK is regulated by the **Health and Safety executive (HSE)**.

H&S is a shared responsibility between employer and employee.

Policies and risk assessments only need to be documented when an employer has 5 or more employees.



**Legal
Obligation**

**Automatically
enrolled into a
workplace pension?**

Best Practice

Best Practice

**Legal
Obligation**

Employers must automatically enrol eligible staff into a workplace pension.

Auto enrolment assessment criteria (2022/23)

There are 3 different categories of worker, determined by age and annual earnings.

- **Eligible jobholders** must be automatically enrolled. Employer must contribute.
- **Non-eligible jobholders** have the right to opt in to a scheme. Employer must contribute.
- **Entitled jobholders** have the right to join a pension scheme. Employer not required to contribute.

Annual earnings above £10,000*	Eligible jobholders	
Annual earnings over £6,240** up to £10,000	Non-eligible jobholders	
Annual earnings up to £6,240	Entitled workers	
	Age 16 to 21	Age 22 to State Pension Age State Pension Age to 74

*£192 per week or £768 per 4 weeks or £833 per month

**£120 per week or £480 per 4 weeks or £520 per month

**Legal
Obligation**

**To undertake right to
work checks?**

Best Practice

Best Practice

**Legal
Obligation**

Employers are legally responsible for checking documents which show permission to work in the UK.

Legal
Obligation

Tell employees how
their personal data is
used, shared and
retained?

Best Practice

Best Practice

Legal
Obligation

A **privacy notice** should be issued to all employees describing the lawful basis and purpose for processing/handling their personal data

Legal
Obligation

To provide a written
contract of
employment?

Best Practice

Best Practice

Legal
Obligation

Employers should issue a written contract of employment **on day 1 for employees and casual workers.**

Written contract of employment for employees

The employment law definition of an employment contract is:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"-
Employment Rights Act 1996

The written statement should reflect the working relationship as accurately as possible!

Employers Legal Obligations- Recap

Employers are legally obliged to ensure their staff are;

- Insured against injury (Insurance Act 1969)
- Paid at or above the National Minimum Wage
- Safe at work (HASWA 1974)
- Assessed and potentially enrolled into a workplace pension
- Eligible to work in the UK
- Personal data is kept safe and only used for legitimate purposes
- Issue a written statement to all employees and workers on day 1



ILG Support

24hr Legal and Employment
Advice Line

01476 512192

or email advice@ilgsupport.com



independent living group

The ILG is a one stop shop for employers, providing a membership portal which includes template documentation, peer support, expert blogs and training to aid employers on their journey.

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A Brief history of Direct Payments

Independent Living Movement

The origins of the Independent Living Movement in the UK go back to the late 1970s and early 1980s.

The services on offer were viewed as out of touch with the real needs of disabled people and based around the **medical model of disability**.

British Council of Disabled People (BCODP) – 1981

“Nothing about us without us”

The European Network on Independent Living (ENIL) - 1989

Social Model of Disability vs Medical Model

The Medical Model of disability views people with disability in need of medical intervention, to be cured or fixed. Under that model, people with disability are to be pitied, considered in need of charity and often hidden away from society.

The Social Model views disability as the result of a person with an impairment living in a world with barriers - *technological, physical, communication and in social attitudes*.

The social model purports that for full inclusion, there must be significant changes made and barriers removed so that people with disability can participate on an equal basis within society.

The First (in) Direct Payments

Applying the principles of the Independent Living movement during the 1980's, some individuals and groups were able to successfully negotiate a financial package which enabled them to move out of the institutions they lived in and into the community.

This was achieved by coming to a social and financial agreement with their Local Authorities based on an assessment of their needs.

The money was used to pay for the support they needed through employing their own personal assistants (paid via a 3rd party provider because it was unlawful to pay cash in lieu of services to an individual).

[BBC Documentary – the Hidden Story of Disabled Britain](#)

John Evans – talking about the IL movement and the first DPs (39 mins)

BCODP study “Cashing in on Independence” – 1994

Cashing in on Independence study found that:

- Support financed by Direct Payments was on average between 30 and 40 percent cheaper than the equivalent service based support.
- People receiving Direct Payments had markedly higher levels of overall satisfaction with their support arrangements than service users. This was mainly due to the increased choice, control and reliability.

The Community Care (Direct Payments) Act 1996

Introduced in 1996 (enacted in April 1997) giving Local Authorities the power to make cash payments in lieu of services.

Key Legislation

Key Dates
and
legislation

1948 – [National Assistance Act](#) - Established principle that care for the vulnerable should be provided by Local Authorities (service based i.e. not cash payments)

1970 – [The Chronically Sick and Disabled People Act](#) – provides a duty to provide social care provision. Still in place for children (sec 2) (replaced by Care Act for over 18's)

1988 – The [Independent Living Fund](#) (ILF) is launched to support disabled people to live independently

1989 – [The Children Act](#) – duty on LAs to promote welfare of children & provide appropriate services

1997 – [The Community Care \(Direct Payments\) Act 1996](#) - cash payments now lawful

2001 – [Carers and Disabled Children Act 2000](#) – *DP for carers & children introduced*

2009 – Health and Social Care Act 2008 - [DP extended to people who lack capacity.](#)

2014 - [Social Care \(Self-directed Support\) \(Scotland\) Act 2013](#)

2014 – Right to have a [Personal Health Budget](#) from NHS (England)

2015 – The [Independent Living Fund](#) (ILF) is closed in England and Wales

2014 – [Care Act 2014](#) (England) - Outcome based, embeds well-being principles

2014 - [Children and Families Act 2014](#) – outcome based, embeds well-being principles

2019 – Right to have a PHB extended to wheelchair services and section 117

Useful links

The Care Act 2014

- [Section 31](#) Care Act 2014 – the main section for adults with capacity to request direct payments
- [Section 32](#) – the main section for adults without capacity to request direct payments
- [Section 33](#) - direct payments: further provisions

[Care Act Statutory guidance – chapter 12](#)

[Care and Support \(Direct Payment\) Regulations 2014](#)

[The National Health Service \(Direct Payments\) Regulations 2013](#)

Direct Payments Legislation – DP for Children

The key legislation governing the provision of services to disabled children.

[Children Act 1989](#) (part 3) (section 17)

[Chronically Sick and Disabled Persons Act 1970 \(CSDPA\)](#) (section 2)

[Children and Families Act 2014](#) – *Care Act harmonisation – introduces personal budgets etc*

The power to make direct payments to people with parental responsibility for disabled children and to disabled 16 and 17-year-olds was created by the **Carers and Disabled Children Act 2000**.

*Section 17A of the 1989 Act, inserted by the [Health and Social Care Act 2001](#), gave councils a **power to offer direct payments to parents of a disabled child or a disabled child aged 16 or 17 in lieu of services which would otherwise have been provided for them by the Local Authority (including periods of respite and short breaks)***

The Care Act 2014

“outcome focused – not service led”

Underpinning principle	General responsibilities and key duties	Key processes
Wellbeing	Prevention Integration and transitions Info, advice and advocacy Diverse care markets Safeguarding	Assessment and eligibility Charging and financial assessment Care and support planning

Summary:

The Care Act aimed to embed and extend personalisation in social care as well as increasing the focus on wellbeing and prevention.

It also aimed to enable local authorities and partners to have a wider focus on the whole population in need of care, rather than just those with eligible needs.

Care Act – Introduced A National Eligibility Criteria

Needs – The adults needs must arise from or be related to a physical or mental impairment or illness.

Outcomes – As a result of those needs the adult is unable to achieve **2 or more** of the following;

- a) managing and maintaining nutrition
- b) maintaining personal hygiene
- c) managing toilet needs
- d) being appropriately clothed
- e) maintaining a habitable home environment
- f) being able to make use of the home safely
- g) developing and maintaining family or other personal relationships
- h) accessing and engaging in work, training, education or volunteering
- i) making use of necessary facilities in the local community including public transport & recreational facilities/services
- j) carrying out any caring responsibilities the adult has for a child

As a consequence, there is, or is likely to be a significant impact on the adult's wellbeing (see next slide)

Care Act – The 9 well-being principles

Councils must promote well-being as defined by the Act;

1. personal dignity (including treatment of the individual with respect);
2. physical and mental health and emotional wellbeing;
3. protection from abuse and neglect;
4. control by the individual over day-to-day life (including over care and support provided and the way it is provided);
5. participation in work, education, training or recreation;
6. social and economic wellbeing;
7. domestic, family and personal relationships;
8. suitability of living accommodation;
9. the individual's contribution to society.

Personal budget – models of support

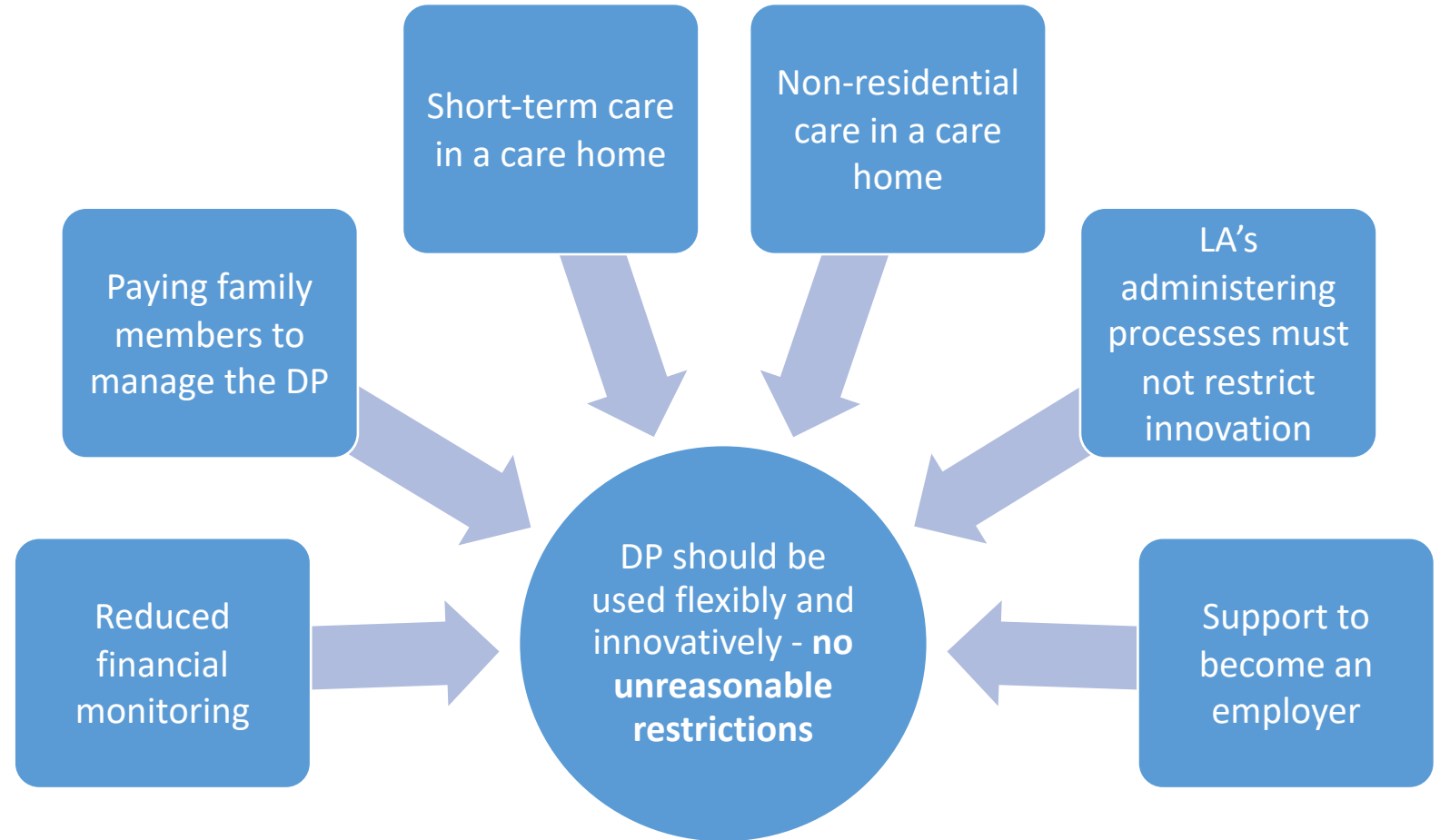
- Anyone with eligible unmet needs would be given a Personal Budget. The CA enabled choice from a range of options regarding how the money would be **managed**;
 - **direct payments (DP)**
 - the local authority managing the budget
 - a provider or third party managing the budget on the individual's behalf (ISF)
- Direct payments are therefore **one** of the ways in which a personal budget can be used in order to meet the outcomes set out in the support plan.

Direct Payments after the Care Act (2014)

The Care Act confirmed Direct Payments as a mainstay of both health and social care in England.

*Scotland/N.I – **Self-directed Support Act 2013**

*Wales – **Social services and well-being Act 2014**



Flexible use of DP – The Care Act

“DP are the Governments preferred mechanism for personalised care and support...they provide independence, choice and control by enabling people to commission their own care and support to meet their eligible needs” - [Care Act statutory Guidance 12.2](#)

12.35 “The direct payment is designed to be used flexibly and innovatively and there should be **no unreasonable restriction placed on the use of the payment**, as long as it is being used to meet [eligible] care and support needs.”

Pre-Care Act flexible use of DP – 2009 guidance!

- *The Department of Health [DP guidance \(2009\)](#) is a useful sense check for anyone keen to understand how DP was promoted by govt. pre-Care Act/Children and Families Act 2014*

For example, it says on page 44;

- The flexibility inherent in direct payments means that individuals can adjust the amount they use from week to week and ‘bank’ any spare money to use as and when extra needs arise (this might be particularly helpful for people with long-term and fluctuating conditions). As long as overall the payments are being used to achieve the outcomes agreed in the care plan, the actual pattern of support does not need to be predetermined.

The Children and Families Act 2014

“outcome focused – person-centred practice”



The Children and Families Act 2014

The Children and Families Act (specifically part 3) aimed to transform the system for disabled children and young people and those with SEN, so that services consistently support the best **outcomes** for them.

The reforms aimed to create a system from birth to 25 through the development of co-ordinated assessment and single Education, Health And Care Plans; improving cooperation between all services responsible for providing education, health or social care; and giving parents and young people greater **choice and control** over their support.

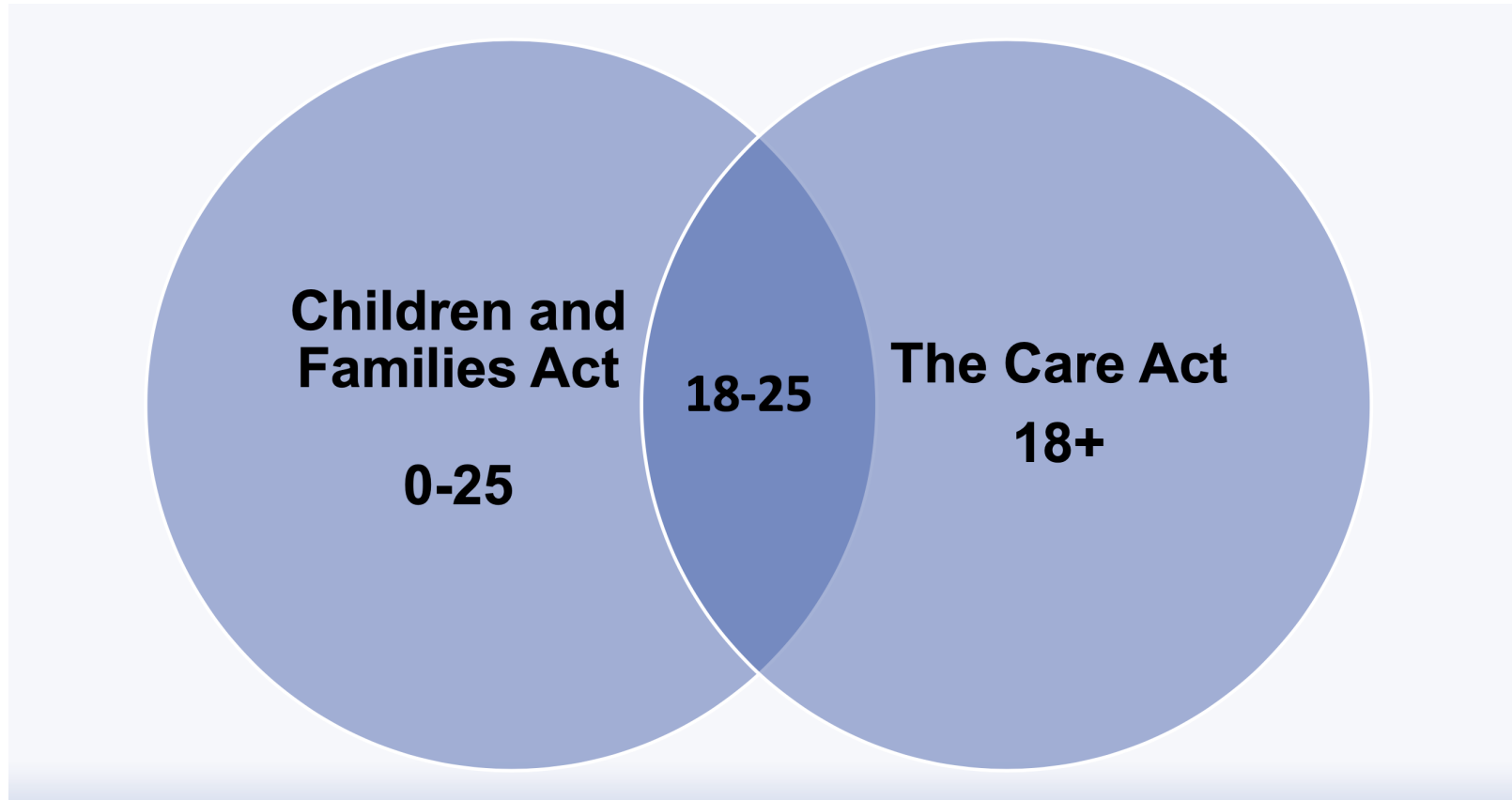
The Children and Families Act 2014 & The Care Act

The emphasis in both Acts is on outcome focused, person-centred practice when considering assessment, planning and support as well as coproduction and multi-agency approaches to planning and commissioning.

This was supposed to provide local authorities opportunities to consider make more effective use of resources by developing:

- pooled budgets across adults' and children's services as well as across education, health and social care
- development of 0-25 teams which would sit across both services

The Children and Families Act 2014 & The Care Act



Choice and Control

Both the **Children and Families Act** and the **Care Act** promote better choice and control over care and support for young people and families.

- The **CFA** provides young people and families the right to request a personal budget as part of an EHC plan. The **personal budget** can be made up of SEN, social care and/or health funding depending on eligibility.
- The **CA** requires local authorities to include a **personal budget** in the Care and Support Plan (Care element of an EHC plan) for individuals over the age of 18.

The Children and Families Act 2014 & The Care Act

CHILDENS AND FAMILIES ACT	THE CARE ACT
Single, co-ordinated assessment process, person-centred approach	Duty to carry out an assessment for young people over 18
Introduced EHC plans - single assessment and planning process for young people with SEN (0-25)	Duty to produce a Care and Support plan for anyone over 18 where eligible needs are identified
Focus on preparation for adulthood from Year 9 at the latest and duty to assess a parent carer or young carer if they have needs for support	Duty to carry out Child's Needs Assessment (CNA) if there is likely to be care and support needs post-18
Must balance welfare of disabled child with Wellbeing of the parent carer	Adult Need's Assessment (over 18) must include personal budget

The Children and Families Act 2014 & The Care Act

The Care Act requires local authorities to establish and maintain a service which must provide information and advice for adults and carers.

The Children and Families Act requires a single point of access for information, advice and support on education, health and social care.

For young people aged 18-25 and their carers these services will overlap and can be aligned and joint funded between children's and adults' services *although this still isn't happening in most places.*



Independent Living Group

Education, Health and Care Plans (EHC) & Direct Payments



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Education, Health and Care Plan (EHC)

- An Education, Health and Care Plan (EHC plan) is a legal document which describes a child's (or young person aged up to 25) special educational, health, and social care needs introduced by the CFA 2014.
- It should clarify the support required, and the outcomes people would like to achieve.
- Direct Payments for EHC plans are regulated by 3 different sets of regs.

EHC plans and Direct Payments

Direct Payments for EHC plans are potentially subject to 3 different sets of regs.

1. Education Direct Payments [SEN PB Regs 2014](#)
2. PHB/Direct Payments for Health [DP NHS Regs 2013](#)
3. Social Care Direct Payments [DP Regs 2009](#)

EHC - Direct Payments for Education

[SEN PB Regs 2014](#)

Section 6

Decision to make direct payments

- **6.—(1)** A local authority may only make direct payments where a request has been made for direct payments to be made and the authority is satisfied that—
 - (a) the recipient will use them to secure the agreed provision in an appropriate way;
 - (b) where the recipient is the child's parent or a nominee, that person will act in the best interests of the child or the young person when securing the proposed agreed provision;
 - (c) the direct payments will not have an adverse impact on other services which the local authority provides or arranges for children and young people with an EHC plan which the authority maintains; and
 - **(d) securing the proposed agreed provision by direct payments is an efficient use of the authority's resources.**
- **(2)** A local authority **may only make direct payments in respect of the special educational provision specified in an EHC plan** and may not make direct payments for the purpose of funding a place at a school or post-16 institution.

EHC - Direct Payments for Health

[DP NHS Regs 2013](#)

Section 4

Direct payments in respect of children

- (2) In determining whether a direct payment should be made in respect of a person falling within paragraph [\(1\)](#), a health body must have regard to—
- (a) whether it is appropriate for a person with that person's condition;
- (b) the impact of that condition on that person's life; and
- **(c) whether a direct payment represents value for money.**

EHC – Direct Payments for Social Care

Community Care DP Regs 2009

Section 11

- Conditions in respect of Direct Payments under section 17A(1) of the 1989 Act

....

(4) A responsible authority may make a direct payment under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act **subject to such other conditions (if any) as they think fit.**



What to do if you're not happy with a decision or care package

The Law and Local Authorities

Local Authorities and other public funding bodies must obey the law.

The type of law governing the conduct of Local Authorities is known as 'public law'.

Public law should ensure that LAs act lawfully, rationally, fairly, and compatibly with the human rights of those affected by their actions.

[See Public Law Projects website for more info](#)

The Law and Local Authorities cont...

Where a Local Authority acts unlawfully there are 3 main avenues to pursue a challenge.

- Complaining using the councils complaints procedures – write to the monitoring officer
- Complaining to the Local Government & Social Care (LGSCO) or Parliamentary, Health Service, Ombudsmen (PHSO for PHB's)
- Through a legal process called **judicial review***

*Judicial review is a process where a judge or judges decide whether a public body has behaved lawfully.

Some recent challenges...

Care Act /Direct payments

- See recent Suffolk JR case [here](#) in which it was determined that the DP was stopped unlawfully.
- See recent Stockport challenge [here](#) – a strongly worded letter from legal firm, [Irwin Mitchell](#), did the trick!

Children services / Direct payments

- Liverpool challenge regarding the DP rate being too low – [Successful complaint](#) to the Local Government Social Care Ombudsman

Some top tips & useful organisations...

- Find your local User Led Organisation (ULO) or [Parent Care Forum](#) for support.
- Don't necessarily jump straight to the complaint's procedure – a well written letter to the social worker (copying in their manager, the director and other key people) with reference to the key legislation often works just as well.
- Always be clear about what you feel needs to be addressed and what it is you want.
- Organisation's that can help if you feel a public body has acted unlawfully and you need support;



Q&A