



Direct Payments & personal budgets

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**A Direct Payment scheme is
a means to an end, and the
end is Independent Living**

John Evans (2000)

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Personal Budget

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Personal Budget

The cost of the care package a disabled person or a carer receives from a LA.

- Broken down into what the LA pays and what charge the DP or carer pays.
- If the LA actually contribution is actually handed over to you as cash, then the PB is referred to as a Direct Payment.

What is the point of a PB?

- Good question.

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Personal Budget

A PB is simply the local authority telling the person eligible for support what the cost to it is, of meeting your care needs.

The PB must be accurately calculated and how the figure has been reached clearly explained

In many respects this is of much interest as being told what your NHS operation cost. Why do you need to know?

If your eligible needs are met by you having a DP, your DP amount is the same as the (net) PB

The need dictates the amount of the PB not the PB dictating the extent of your need

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Personal Budget

Care Act 2014 requires that every care plan must have a PB (sections 25 & 26)

No requirement for disabled children to have a PB

- The PB must always be an amount sufficient to meet the person's care and support needs
- Must include the cost to the LA of meeting the person's needs
- This overall cost must then be broken down into the amount the person must pay (their charge) and the amount the LA will pay.

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Personal Budget (s26)

The Carer Act creates a duty to provide a 'transparent budget in a care and support plan' and a failure to do so will be a breach of public law

CP v. NE Lincolnshire Council [2018]

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Personal Budget

Local Government Ombudsman

- Profoundly disabled adult cared for by her mother who had her own health problems: she had eligible care needs for 9 of the 10 outcomes.
- LA assessed a need for 52 wks care a year including 6 weeks respite care. Residential respite not appropriate so the respite funding used for extra home support.
- LA provided a DP of £849.57 a week to meet her normal eligible care needs.

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Personal Budget

Local Government Ombudsman

Detailed explanation as to how DP calculated – ie:

DP to be used to buy agency support:

- 18 hours at the social rate of £12.24;
- 10 hours at the unsocial rate of £13.36;
- six 30 minute double handed calls at the social rate of £7.01 per call;
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Total £849.57.

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Personal Budget

Local Government Ombudsman

Normal rate £849.57.

LA then stated that the weekly respite rate - ie when mother not providing unpaid care) would be its standard 'respite care rate' of £659 a week (no calculations provided).

Maladministration

- LA had failed to explain how £659 was enough to meet the daughter's need for respite care
- Had adopted a "one size fits all" approach to people with physical disabilities .

Complaint against Kent CC 13/12/2016 para 18

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Personal Budget & Ombudsman

Local Government Ombudsman

- The council used a RAS [a Matrix Assessment Tool' ('MAT')] designed to 'ensure limited resources could be fairly allocated to families based on need'.
- The ombudsman held this to be unlawful. That its purpose was:

to ration available resources. The Care Act requires councils to meet eligible needs. It does not allow rationing for any reason (para 83).

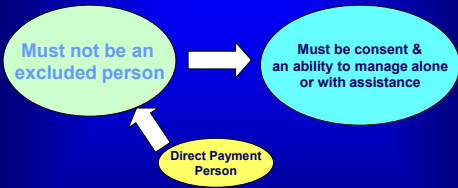
Complaint – Wiltshire CC 16 015 946 (2018)

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Direct payments

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Direct Payments



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Direct Payments

Disabled children

Duty to make payments to a person with parental responsibility (or to the young person if aged 16-17) when:

1. the person appears to the LA be capable of managing a DP by themselves or with such assistance as may be available to them;
2. the person consents to the making of a DP;
3. the LA is satisfied that the assessed need can be met by means of a direct payment; and
4. the LA is satisfied that the welfare of the child will be safeguarded and promoted by use of a DP.

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Direct Payments

Disabled adults with 'capacity' & carers (of adults)

1. the adult / carer requests a DP;
2. the adult / carer the person consents to the making of a DP;
3. the LA is satisfied that adult / carer are capable of managing the DP alone or with assistance;
4. the LA is satisfied that making of a DP is an appropriate way to meet the needs in question

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Direct Payments

Disabled adults without 'capacity'

1. an authorised person requests a DP for the adult;
 - ie a LPA / Court of Protection deputy or
 - Someone the LA considers to be a suitable person
2. the LA is satisfied that the authorised person will act in the adults best interests with the DP;
3. the LA is satisfied that adult / carer are capable of managing the DP alone or with assistance;

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Consent

Presumption of capacity

Everyone 16 or over is presumed to be capable of handling their own affairs unless the contrary is shown

s1(2) Mental Capacity Act 2005

A person must be assumed to have capacity unless it is established that he lacks capacity

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Consent

the mental capacity required by the law ... is relative to the particular transaction which is being effected

Section 2(1) MCA 2005

a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain

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a person lacks capacity **in relation to a matter** if at the material time he is unable to make a decision for himself **in relation to the matter** because of an impairment of, or a disturbance in the functioning of, the mind or brain

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2009 Guidance para 58

Consider the following questions:

- Does the person have a general understanding of what decision they need to make and why they need to make it?
- Does the person have a general understanding of the likely consequences of making, or not making this decision?
- Is the person able to understand, retain, use and weigh up the information relevant to this decision?
- Can the person communicate their decision?

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Consent

Choice

- Once a LA has decided that care required, then it can be required to provide DPs in lieu of services.
- Unlawful for a LA to have a policy of refusing DPs for certain services (eg respite care or 'in house' services or via a block contracted service)
- Or of requiring reasons to be given why a person wants a DP

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Consent

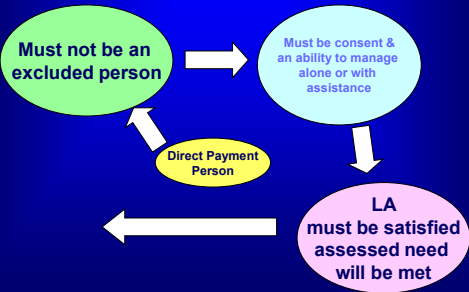
Choice

- Maladministration not to directly commission care but to put individuals in a position where they feel that they have to have a DP
- Ombudsman considers that in general that directly commissioned care should be available within a reasonable timeframe (for example within 2 weeks of the assessed need being identified).

Lincolnshire County Council No. 16 019 120 2017 para 13.

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Direct Payments



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Direct Payments

Not an excluded service



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Excluded services

Local authority 'in house' services

Long periods of residential care

= 4 "weeks" in any 12-month period

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Excluded services

- where the period between two stays is less than 4 weeks, then the two stays should be added together to make a total, which should also not exceed 4 weeks if it is to be paid for with DPs.
- On the other hand, if two residential care stays are more than four weeks apart then they are not added together

Children's 2009 guidance para 102

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Direct Payments

Not an excluded Service provider



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Excluded service providers

- Spouses / partners
- Relatives living in the same household
- UNLESS
- the social services authority 'is satisfied that securing the service from such a person is necessary
- [for a child] to promote his or her welfare (reg 11(1)(b) of 2009 regs)
- [for an adult] (reg 3(2) of 2014 regs).

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Employing family members

- YP blind, deaf & required constant supervision.
 - 'Needed' continuity of carers.
 - DP paid to her father to provide the care.
 - LA decided to no longer allow this arrangement.
- The ombudsman held this to be maladministration.
- The LA accepted that the father was best placed to provide the care (particularly given her communication difficulties) but had given no rational reason for requiring the direct payments to be used for an alternative carer.
- Complaint no 12 015 328 against Calderdale Council, 20/11/ 2013

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Employing family members

- Young adult serious spinal injuries at university wanted to employ his mother as his PA using DPs.
 - She a single mother who gave up work to care for him.
 - Council refused applying a test of 'exceptional circumstances', which the ombudsman held was incorrect – the test was *'whether employing a family member is "necessary"*.
 - Ombudsman held that any assessment as to whether it was 'necessary' to employ the adult's mother, had to include consideration of how his care needs would otherwise be met – and there was no evidence that the council had looked at this question.
- 2015 No 14 005 078 against Cheshire East

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Direct Payments

Agreement
on
amount
of
payment



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Amount of payment

- DPs must be sufficient to enable the recipient lawfully to secure a service of a standard that the LA considers is reasonable to fulfil the needs for the service to which the payment relates –
- 2009 guidance ~ para 4.31 [Children]
- 2014 statutory guidance ~ para 12.25 [adults]

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PAs and Agencies

Agencies

- where an authorised person receives a DP for someone who lacks capacity to request the DP (CA 2014 s32) does not wish to employ a PA, then the DP should be sufficient to enable an agency to be paid to provide the necessary care.

Ombudsman Cornwall CC 13 006 400 (2015)

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Amount of payment

The same duty as for Personal Budgets –

Local Government Ombudsman

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Complaint against Kent CC 13/12/2016 para 18

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Direct Payments

Obligation
on Direct
Payment
Recipient



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Obligations of DP recipient

- LAs should avoid setting up disproportionately intensive monitoring procedures
Children's 2009 guidance para 92
- LAs should aim to ensure that the information that the individual is asked to provide is as straightforward and the least onerous possible, consistent with monitoring requirements
Children's 2009 guidance para 222

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Support

A support service helps to produce better outcomes for both individuals and councils. When establishing and reviewing support services, councils should seek to ensure that the range of support provided reflects the needs of local people receiving social care support and their carers. A good support service can make DPs an accessible and attractive option for a wide range of people. Having offered DPs where appropriate, councils should seek to ensure that people who express an interest do not have to wait unduly for further advice

Children's 2009 guidance para 36.

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Support might include eg

- a list of local provider agencies
- support & advice in setting up & maintaining DPs inc financial management
- Help with adverts, job descriptions & contracts
- help in explaining the safeguards in employing people working with children / vulnerable adults
- rooms for interviews / assistance interviewing
- an address for responses to advertisements
- advice about legal responsibilities of being an employer
- support & advice about being a good manager of staff

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Support might include eg

- support & advice re equality / diversity, inc advice about legislation covering employment / access to goods etc
- information about income tax & national insurance
- a payroll service
- advice on health / safety issues, inc moving & handling
- regular training – eg assertiveness, budgeting skills
- some emergency cover support
- signposting to other services eg welfare benefits / advocacy
- advice about user-controlled trusts.

Children's 2009 guidance para 37.

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Conditions

- LAs may set reasonable conditions on DP arrangements, but need to bear in mind when doing so that the aim of PDs is to give individuals more choice and control over their support and how it is delivered.
- choice and control would be undermined by a condition that (eg) the individual receiving DPs might only use particular providers.
- Conditions should be proportionate and no more extensive than is reasonably necessary.

Children's 2009 guidance para 92.

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Pre-payment cards

The adult guidance (Statutory Guidance to Care Act 2014) states that pre-paid cards:

'should not be provided as the only option to take a direct payment' and that 'the offer of a 'traditional' direct payment paid into a bank account should always be available if this is what the person requests and this is appropriate to meet needs' (para 12.58).

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Pre-payment cards

The Guidance continues (para 12.59):

It is also important that where a pre-paid card system is used, the person is still free to exercise choice and control.

there should not be blanket restrictions on cash withdrawals from pre-paid cards which could limit choice and control. The card must not be linked solely to an online market-place that only contains selected providers in which to choose from.

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Non-standard services

- Direct payments do not have to be used in the same way as if support was being provided directly by the local authority. Indeed, they are intended to give the individual the maximum degree of choice and control over how their eligible needs are met

Children's 2009 guidance para .

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Health & Safety

As a general principle, LAs should avoid laying down health and safety policies for individuals who receive DPs.

Individuals should accept that they have a responsibility for their own health & safety, including the assessment and management of risk. They should be encouraged to develop strategies on lifting and handling and other tasks, both in the home and outside it

Children's 2009 guidance para 132.

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Repayment

- ... repayment should be aimed at recovering money that has been diverted from the purpose for which it was intended or that has simply not been spent at all, or where services have been obtained from someone who is ineligible to provide them. It should not be used to penalise honest mistakes, nor should repayment be sought where the individual has been the victim of fraud.

Children's 2009 guidance para 245.

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Discontinuance

The council should not automatically assume when problems arise that the only solution is to discontinue or end direct payments.

If the council does decide to withdraw direct payments, it will need to arrange the relevant services instead, unless the withdrawal was following a reassessment after which the council concluded that the services were no longer needed

Children's 2009 guidance para 259 - 260

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Criminal Record checks

Promoting the use of Criminal Records Bureau (CRB) checks is important to help ensure that appropriate staff are employed within social care. Councils should take steps to inform direct payment recipients about the option, and in some cases a duty, to make such checks on those they employ, as well as about the associated benefits and limitations of such checks.

Children's 2009 guidance para 129.

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Transition

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Transition

Under 16



DP to Parent

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Transition

16 or 17



DP to Parent



Young Person

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Transition

Over 18



Disabled Person



Authorised
Person

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DPs and 16 / 17 year olds

2009 Guidance para 45

- Young people who receive DPs may also find it helpful to have access to advocacy support. This should be separate from any support or advocacy provided to their parents

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DPs and 16 / 17 year olds

2009 Guidance para 46

- Where there is a difference of views between parents and YP aged 16 or 17, the council should make their own assessment of whether the young person has the ability to manage the DPs themselves.
- If, in the council's opinion, the YP is able to manage the DPs, with appropriate support, and DPs would be consistent with the council's duty to safeguard and promote the welfare of the YP, then it has a duty to make the payments.

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NHS CHC Direct Payments

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NHS & Direct Payments

s12A NHS Act 2006

- Duty on CCGs to make DPs to patients
- NHS (Direct Payments) Regulations 2013

Guidance

- A parallel regime to existing SS schemes
- Department of Health *Personal Health Budgets Guide: Budget setting for NHS Continuing Healthcare* (2012)

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