How to help *yourselves*
by helping the service users
to assert their rights
to an adequate, legally compliant
(and bearable) resource allocation!

Belinda Schwehr
01252 725890 / 07974 399361
belinda@careandhealthlaw.com
Popular but legally **uninformed** positions on the part of councils

- The rate is the rate, you’ll have to just cope with it...
- You can’t have a direct payment unless it’s for less than it would cost us
- No-one can have more than the cost of residential care
- We only do life and limb stuff, not the fluffy stuff.
- We can tell carers that they must go on caring.
- We can mess about with the RAS input figures with impunity
- The estimated budget is the maximum amount but not ever the minimum.
- We can take your financial position into account regarding **eligibility** – eg refuse to acknowledge **need** when we take the view that you can afford to meet your own needs, eg because you’re on the extension ILF fund or mobility allowance.
Dodgy assumptions often made by proponents of SDS and service users

• We can spend the direct payment on whatever we like – it’s for our needs and we are the decision makers.
• Once I’ve got something in my care plan, it can’t be taken away.
• We can employ people informally and pay less than the minimum wage.
• We can refuse to agree a support plan and the council will just have to give in.
• We can give our money away so that we don’t have to pay for care.
• We can tell the State in which sort of setting our needs should be met even if it costs the public a lot more than it could...
• Cost is irrelevant to the determination of an appropriate response to my assessed eligible needs.
Wrong assumptions by providers...

• We are owed an existence, no matter what is happening to the market, or policy
• Our contracts can’t be varied (maybe true, but they can be terminated!)
• If we just keep our heads down, personalisation will go away
• Why should we advertise, or think about marketing, or our unique selling points? We’re not like any other business...
• 24 hour care means a different thing for older people than it does for younger people...
• A client’s package can’t be cut unless they’ve ‘got better’...
• What’s the point of knowing how much it costs us to provide care?
• People have a human right to stay in their own home, regardless of the cost
• Independent living means living outside of a care home...
• People have rights to care, from the state, regardless of how difficult they might be.
Legal wrongs currently being done to service users

- Point-blank **refusals** of assessment, review or direct payments – *Bristol (1998)*
- Leaving out whole swathes of potential needs from needs questionnaires when considering eligibility – *Haringey (1997)*
- Cuts to current care plans **without any re-assessment** – *Gloucestershire (1997)*
- Changes to plans after **purported** re-assessments, but without proper consultation of the incapacitated client’s Best Interests consultees... *Croydon, (2011)*
- Changes to plans, on consideration ONLY of **cost** – *Bromley (2004)*
- Completely unexplained **savage** cuts to existing care plans or direct payment values **after** re-assessment – *Birmingham (1999)*
- Unfeasibly greater expectations of carers, universal services and ‘social capital’... Regardless of their adequacy or ability...
- Tinkering with the local FACS threshold, non-compliantly with the FACS guidance – *IoW, (2011)* – or without proper consultation – *Birmingham, (2011)*
- System **slow-down**, panel re-referrals for want of enough evidence.... and the use of waiting lists – see *Sutton (1998), Sefton (1997), South Lanarkshire (2000)* and the 2010 FACS guidance about doing **something**, at least, in the interim, after a finding of eligibility...
More wrongs...

- Requirements of the client to move house (ie to buy or take a tenancy somewhere) to make services cheaper or easier to manage, as a pre-condition of getting anything...
- Cuts to core underlying services in Supported Living or Extra Care, without reassessment of the heightened unmet need above the threshold.
- Improper fees negotiations without transparent changes in the client’s care plan, or without adequate consultation with providers – *Pembrokeshire, (2011), Sefton (2011), Leicestershire, Devon, Newcastle (2013), etc.*
- Allegedly ignoring Human Rights and dignity with regard to assessment of need or determination of response - it’s whoever dares, wins, here... - see *K&C, McDonald (2010)*
- Preventing involvement of the client and carers at Panel – see *Wandsworth (2004)*
- Refusal at panel of particular items, services, arrangements, or funds – without any rational basis and without written reasons – see *K&C, Savva (2010) and Cambridgeshire (2012)*
What are the clients’ rights, then?

• To be assessed within a **reasonable time**, for **eligibility**, by reference to the **locally applicable Fair Access threshold**, for community care services...

• That assessment to have been done in accordance with the **Assessment Directions** of 2004, with regard to carers’ input, and in accordance with the **Mental Capacity Act**, if the person lacks capacity to participate and to consent to the outcome – ie involving **Best Interests Consultation of anyone feasibly interested in the person’s welfare**.

• To have a support plan **drawn up** by a competent council employee or lawful delegate – **albeit with as much input as possible in relation to one’s capacity**; a plan which complies with the **general law** in this country, such as race and sex discrimination, the **duty of care** that would be owed by anyone doing the services, the person’s **human rights**, properly understood, and in accordance with the **Choice Direction** if it is care in a care home that is being offered.

• That support plan to have been properly **signed off** by the council with **written reasons** (if there is a disagreement by the end of the process) articulating the justification for its formal stance at the end of the process that the arrangements mentioned in the plan (or the sum of money, if it is a direct payment that has been agreed) **will meet** the person’s assessed eligible needs adequately and appropriately.
The service user’s rights, continued…

• To have their eligible assessed needs **met**, appropriately, in the opinion of the council, by way of provided or arranged services, unless or until the person is re-assessed lawfully.

• To have a money sum in lieu, **by way of a direct payment, if the council agrees it could work.** This extends to **incapacitated** people, if the council is willing to appoint a third party as a **Suitable Person**.

• To continue to have the contents of the support plan **delivered**, regardless of available financial resources, until the person has been lawfully re-assessed with a different outcome.

• To be **charged** no more for the service or direct payment than the law allows, depending on whether the service is residential or non-residential, according to the person’s means.

• To have their situation **reviewed** at least once a year in a lawful manner, or whenever there is a significant change in the person’s situation.

• But please note - there is no **appeal** against a care plan – only acceptance, or re-negotiation, refusal, a complaint, or **judicial review for unreasonableness, illegality, unfairness or a breach of human rights**.

© Belinda Schwehr, 2013
Flexibility in relation to outcomes, and the council running out of money – the English 2010 FACS guidance says ‘Tough’!

124. Councils should plan with regards to outcomes, rather than specific services. They should consider the cost-effectiveness of support options on the merits of each case and may take their resources into account when deciding how best to achieve someone’s agreed outcomes. However, this does not mean that councils can take decisions on the basis of resources alone. Once a council has decided it is necessary to meet the eligible needs of an individual, it is under a duty to provide sufficient support to meet those needs. Councils should provide support promptly once they have agreed to do so, but where waiting is unavoidable, they should ensure that alternative support is in place to meet eligible needs.
Appropriateness – the crucial concept

• Councils have **massive** discretion over **what it is appropriate to do** to meet need, so long as they abide by any relevant legal rules, have competent professional consensus and an evidence basis behind their conclusions, and pay proper attention, in terms of decision-making, to human rights, and fair process, and the giving of reasons to service users and families.

• Affordability and cost-effectiveness between two legitimate options, and councils’ other duties of equity to all potential clients, in terms of quality or standard, are **legally relevant** to appropriateness.

• So, yes, what they were happy to fund 2 years ago, **may no longer be what they can afford to regard as appropriate, now, and they can pass the pain on to clients**, within reason. Social care service users are just like the rest of us, in this regard, not in a **better** position.

• So on ‘soft’ things like leisure, and holidays, which add to a person’s quality of life but which are not essential to most people’s dignified survival, councils have both an obligation and a power to come off the fence and say, even though they find someone **eligible** for help, **just how much** of a service they think is appropriate, in terms of society’s views as to what’s tolerable. If they are giving roughly the same as other councils, it is unlikely to strike a judge as unreasonable.

• **Respite and transport services are not quite so soft**, to my mind, because respite levels go to a carer’s willingness and ability to carry on meeting needs; and transport to services that **themselves** have been acknowledged as a must, would seem to be an irrational thing to cut.
Are the council’s inevitable resources difficulties relevant to what’s **appropriate** in the first place?

- If the authority agrees that the need can **only** be met in one way, **appropriately**, then the cost of any other **inappropriate** way is completely irrelevant – because it would **not** be lawful in the first place to use that other method.
- Local authorities cannot therefore assume that everyone ‘**can**’ have their needs met for the cost of a residential care place. For some at least, albeit only the exceptional few, it would never be appropriate, **in terms of professional judgment**.
- A lack of resources (money in the social services coffers) is legally **irrelevant** to the **doing** of the duty to meet eligible need **appropriately**, once it has been assessed. **It is a corporate (a council’s, not just social services) absolute duty until the person has been legally re-assessed and either found ineligible or the support plan legally altered.**
- But not even I can say that there’s a case or a law that says it’s completely irrelevant as to **how** one meets need **appropriately**.

© Belinda Schwehr, 2013
More on the relevance of resources

• A lack of resources - *in terms of non-existence of any appropriate service to buy* - is *not* something that law can change, but the law says that something must be done or arranged *in the interim*, *ie the next best thing*, even if it costs more than was expected for the level of need concerned, in the short term.

• But in times of *economic hardship*, judges will be bound to be sympathetic to the contention that less than perfect ways of doing things, are at least *not in*appropriate, such that it will probably be seen to be lawful to offer the not so perfect means of meeting need, even though no-one thinks it’s that wonderful.

• That is the harsh truth for clients, deriving from the fact that all this money is *public* money – tax payers’ money, ultimately.

© Belinda Schwehr, 2013
The central position of providers...

- You are, in the main, **regulated activity providers**, providing services for a **fee**. You are doing it from **choice**, not a **duty**.
- You admit clients to your services, it being assumed that you are all professional enough to take on **only so many with such needs as you expect to be able to cope with**, at the price you are willing to take.
- So, as long as you are **willing to continue to honour the client’s support plan**, you are **the key** to the council’s own performance of its **own public law duties toward the client**.
- If you agree to cut your price, without cutting the service, the client is **not actually suffering**, nor are **their** rights being ignored.
- **Your profits**, though, **will** suffer. And your peace of mind, in terms of cutting the cloth forever more thinly, with ongoing worries about risk management.
- If you **do** cut the price because the council turns a blind eye to your also watering down the service in a way which the woolliness of the lovely ‘ONLY outcomes based’ care plan has allowed – then you keep the client, the council stays lawful, but the service user **gets less, or a lower quality**. The horsemeat issue, in care!
- If you drop the price, and so do all of your competitors, you will have handed the council sector the evidence it needs in order to say that the cost of care has gone down....
- So providers, individually, are the bastions of the quality of social care, if only you have the guts, individually, to say **‘Hell No, We Won’t Go That Low!’**

© Belinda Schwehr, 2013
Battles that clients can’t win

• If providers cut their price, **AND** the council cuts the services in the support plan, the client **is** affected – but let’s explore **how**, exactly, for a moment:
  • Let’s assume that...
    – the person has been re-assessed as genuinely *needing* less of a service, because of other things that have changed in their lives;
    – or that the council has dared to raise its FACS threshold, and the person is no longer *eligible*, in certain *areas* of their lives.
    – or that the council has openly and honestly said to all existing and future clients that it needs to take a new view, in light of its financial difficulties, about what can count as *appropriate* to meet assessed needs, and that it knows it will be hard at first, but will the provider and client all give it a go - with a promise of re-instatement of the original service contract if the client deteriorates?
• None of these reasons for a cut to the client’s package, **is likely to amount to strong grounds for a successful judicial review by the service user** – if they have been *re-assessed properly*.
• The public may not like it, **but that is the law**.
However, no-one should ever assume that councils are doing it *properly*...

• Suppose we imagine that the cut is because the contents of the support plan are no longer treated as something that the council can afford to provide, but the person has **not** been lawfully re-assessed at all. It was an assessed need last year and now it’s just been cut. Suppose that no-one is fighting that – for whatever reason – eg fear, ignorance, dependency or simple acquiescence: that’s not honouring the client’s rights. That’s the provider and the council both crossing their fingers, in effect! That should not feel *good*, to providers.... And there’s a case about why it can’t happen, in English law, that can be used by clients – it’s good old Gloucestershire....from 1997.

• Or, maybe the support plan was so woolly in the first place that no-one can say that there was anything ever actually specified in it, that’s now missing, but the client is still getting less of *something*, than they did, before, because their RA was lower than the cost of last year’s package. **Outcomes based specification** is conveniently **flexible**, for both the provider and the purchaser, and those with direct payments. But it’s not great for the end-using recipient of a managed care package. **This is a subtle bit of risk-transfer, dressed up to look like personalisation of the care package** - which is not so cool, from the client’s perspective.
Another typical scenario

• Suppose now, that the person *has* been re-assessed, but very superficially, by a costs broker; or by someone who knew nothing about fluctuating needs, or without their families being involved, even though the person was mentally incapacitated. The council has lowered its offer to the client and to the provider.

• And suppose the provider accepted it, because it meant they could keep the client, and the provider was just left to decide what to ‘thin out’ of the package or whether to keep it the same, but make a smaller profit. ...

• *Maybe no-one in the client’s family knew how to fight that stance* on the part of the council, and they are not bothering, because at least they’ve still got the *provider*? *But the provider is the one who decides what it sells; they have views about what is adequate; why would they let the money supply determine what a client needs?* If they stick to their principles, and if the council can only buy packages believed by providers to be adequate, knowing the clients much better than the councils do, councils won’t be able to say that a package is actually available on the market for 2/3 of the requested fee.
Where is the line, then?

- Although social care law is very woolly indeed, and leaves an awful lot turning on the council staff’s subjective judgements, service users are owed (a few) very important duties under community care law.

- I am not just talking about a duty of care. That’s a concept from the law of negligence and is only relevant in terms of what goes wrong...

- The council is a public body and I’m talking about its duties in public law to do what the statute covering community care functions, requires councils to do. Why? Because these duties can’t be ignored, just because of financial difficulties. That’s the whole point of councils – to make tough decisions on what not to do, IN ORDER TO FUND THEIR DUTIES. Adults’ services for eligible needs are statutory duties.

- Service users have rights to enforce these public law duties through the courts, in what’s called judicial review proceedings. Coherent threats are often just as effective, and free to make. Even as a provider, companies can help people to make them.

- People on benefits can get legal aid for such challenges if they can be got to a lawyer with a community care franchise to do the work.

- Incapacitated people can bring such proceedings through what’s called a Litigation Friend, as long as there’s someone with no conflict of interest to take on the role.

- If there’s no-one, the Official Solicitor can be asked to take on the role.
Complaints and challenges

• The complaint system is not designed to solve legal disputes. It is there for matters related to incompetence or rudeness, or delay which should not have happened.

• It is a good remedy for people in a long-standing relationship of provider and client, but not good if what needs to be changed is a policy or practice that no-one thinks can change.

• Complaints are free to the user. The LASS & NHS Complaints (England) Regulations 2009 must be applied.


• Judicial review is the only way to get an injunction in an emergency, if the MO won’t support you. To commence proceedings, in reality, a person tends to need a lawyer, but there IS funding for people below certain financial thresholds, if you can find a firm who’s interested and who has a community care law franchise to provide specialist advice services.
• If a person has got access to someone who can write an assertive letter to the council’s Monitoring Officer, identifying what’s going on that’s clearly arguably unlawful, the Monitoring Officer (usually the Head Lawyer and definitely not the contracts or quality or complaints officer!) has an independent duty to ‘engage brain’ and decide whether the person is making a reasonable point.

• If so, the Monitoring Officer has to intervene to ensure that the decision is suspended or the conduct stops or changes. This is a free ‘service’ – it’s part of this country’s commitment to governance of the public sector.

• Councils also owe duties to the community in general, when changing things. They are accountable if they do not do proper consultation. The Monitoring Officer can be written to about that sort of thing, as well.

• Providers – on the other hand, are not owed duties, by councils. They will either be in a contractual relationship with councils, or be recipients of grants.

• Providers are, at one and the same time, the most natural supporters of, and also the least well-placed to stand up for service users, because of the conflict of interest between them and the client – providers earn an income stream from the status quo. So any advocacy you might pay for will appear to be tainted by your own commercial interests.

• It’s often more effective to make sure the client or family know their rights.
The last word... The most recent provider’s challenge lost, against Northumberland Council, 2013

• In the most recent case, the providers argued that the approach of the council was so bad that it justified bringing judicial review proceedings – but 70% of them signed up to the new contract at the offered price – without moaning very much at all. So the council had evidence it could discharge its duty for less than it had paid before...

• As a provider, you are not MADE to accept an unfeasibly low price, in this world – you **choose to, or you choose not to**.

• Be warned, and make grown-up decisions, without breaching the Competition Act.

• Get legal advice before you give a discount – David Collins (the firm) and Aileen McColgan (barrister) are both winning (Redcar) and losing cases (Northumberland), all around the country, and can cope with more.

© Belinda Schwehr, 2013
Top 10 cases for adults’ social care law

- **Gloucestershire, 1997** – the case that says that a person is entitled to have their needs **met** – even if the council has run out of social services money – unless and until the person is **lawfully reassessed** as no longer being eligible for a service or funding – but also saying that the council can **raise its eligibility threshold**, on account of being hard up....

- **Birmingham ex p Killigrew, 1999** – about cuts to care plans and how the council must articulate **where the needs have gone off** to if they say a cut should be made on account of a lessening of needs...

- **Cambridgeshire v KM, 2012** – about how much money is lawfully ‘enough’, and how much reasoning, behind the amount, is lawfully ‘enough’ to be fair and transparent

- **Kensington & Chelsea v Savva, 2011** – about the need for transparency of the Resource Allocation System and the client’s right to **written reasons** from the actual decision-maker, if they are rejected for eligibility, a particular support plan, or funding

- **Croydon, 2011** – about parents’ and providers’ rights to be at the heart of a re-assessment, considering whether an incapacitated client is suitably placed – and the illegality of the reassessment if this is not part of the process

© Belinda Schwehr, 2013
The rest of the top 10

• **Kensington & Chelsea v McDonald, 2011** – about how the council is ultimately the decision-maker about whether a perceived need is a want or a need, or a need that *necessitates* intervention by the council – subject only to judicial review – due to extreme or irrational unreasonableness, unfairness, illegality or a breach of human rights.

• **Isle of Wight, 2011** – about the importance of *following FACS guidance* for the proper implementation of an eligibility policy, indicators and threshold.

• **KK – 2012** - how to get a care package in your own home, even if it involves risk!

• **Hillingdon v Neary, 2011** – about the council’s obligation to take itself to the Court of Protection if a dispute about *deprivation of liberty* still rumbles on after the Safeguards have authorised the situation.

• **Sefton, Northumberland 2012** and **2013** – why councils’ commissioners cannot just offer providers less than last year’s fee, without listening to them carefully and remembering that *councils* have a duty to *provide* care, if they cannot actually *purchase enough of it*. But also providers must say NO to unfeasibly low fees.

© Belinda Schwehr, 2013
Thank you so much for attending!

- Belinda can be contacted on belinda@careandhealthlaw.com, or Tel 01252 725 890 or 07974 399361.

- My website, www.careandhealthlaw.com, offers free (and some charged-for) topic overviews about health and social care law; ‘hot news’ emails when an important case has been decided by the courts, and access to these web-based training courses.

- For traditional face-to-face training, and regional events, contact Mary Humphrey, my reservations manager, on 01379 678 243 or by email on mary.humphrey@nationalhomecarecouncil.co.uk