

# DRAFT CONSULTATION REGULATIONS

## CLAUSE 49

### THE SPECIAL EDUCATIONAL NEEDS (PERSONAL BUDGETS AND DIRECT PAYMENTS) REGULATIONS [2014]

#### Citation and commencement

1. These Regulations may be cited as the Special Educational Needs (Personal Budgets and Direct Payments) Regulations 2014 and come into force on 1st September 2014.

#### Interpretation

2. In these Regulations—

“the 1996 Act” means the Education Act 1996;

“the 2014 Act” means the Children and Families Act 2014;

“agreed provision” means the qualifying goods and services or that part of those goods and services which it is agreed is to be secured by means of direct payments in accordance with regulation 11(1);

“direct payment” means a payment made by the local authority in accordance with these Regulations;

“nominee” means a person nominated in accordance with regulation 4;

“qualifying goods and services” means any of the goods and services that form the special educational provision specified in an EHC plan but does not include the place at a school or post-16 institution.

#### Persons to whom direct payments may be made

3.—(1) Subject to paragraph (2), a local authority which is responsible for securing or maintaining an EHC plan in relation to a child or young person may make a direct payment to a person who is either the child’s parent or the young person.

(2) Direct payments may only be made to a person falling within paragraph (1) if the person—

- (a) appears to the local authority to be capable of managing direct payments without assistance or with such assistance as may be available to them;
- (b) is a person over compulsory school age;
- (c) has capacity to consent to the making of direct payments to them; and
- (d) is not a person described in the Schedule.

#### Nominees

4.—(1) Subject to paragraph (2), a local authority may make direct payments to a nominee who has been nominated in writing by the child’s parent or young person to receive the direct payments on their behalf.

(2) The local authority must be satisfied that the proposed nominee satisfies the criteria specified in regulation 4(2).

(3) If the child's parent or the young person notifies a local authority in writing that they wish to withdraw or change their nomination, the local authority must stop making direct payments to the nominee as soon as reasonably practicable, and where applicable, consider whether to make direct payments to any alternative nominee who has been nominated by the child's parent or the young person.

### **Requests for a personal budget or direct payment**

5. The parent or young person may make a request to a local authority for a personal budget, including a direct payment at any time during the period in which—

- (a) the draft EHC plan is being prepared in accordance with section 38 of the 2014 Act; or,
- (b) an EHC plan is being reviewed or re-assessed under section 44 of the 2014 Act.

### **Decision to make direct payments**

6. Before deciding to make direct payments, the local authority must be satisfied—

- (a) that the way in which the person who receives the direct payments proposes to use them to secure the agreed provision is an appropriate way to do so;
- (b) that where a parent or nominee is to receive direct payments, that person will act in the best interests of the child or young person when securing the agreed provision;
- (c) that the making of 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 for which the authority is responsible; and,
- (d) that securing the agreed provision by means of direct payment is compatible with the authority's efficient use of resources.

### **Information, advice and support**

7.—(1) The local authority must make arrangements for the provision to the parent, the young person and where relevant, the nominee, of the following information

- (a) the provision for which a direct payment is available;
- (b) the conditions which must be met before a direct payment may be made; and
- (c) details about organisations that may be able to provide advice and assistance to the parent or young person in relation to direct payments.

8. Where the provision of advice and assistance by an organisation in accordance with regulation 7(c) is subject to a reasonable charge, such advice and assistance may be treated as qualifying goods and services for which a direct payment may be made.

### **Decision not to make direct payments**

9. Where a local authority has decided not to make direct payments it must—

- (a) inform the parent or young person of its decision in writing, giving reasons and informing the person of their right to request a review of its decision;
- (b) where requested, review its decision and in carrying out the review consider any representation made by the parent or young person; and
- (c) notify the parent or young person of the outcome of the review in writing, giving reasons.

## Agreement for Direct Payments

**10.**—(1) Before a direct payment can be made a local authority must agree in writing with the person to whom the direct payments are to be made the qualifying goods or services which are to be secured.

(2) That agreement must specify—

- (a) the name of the child of young person in respect of whom direct payments are to be made;
- (b) the qualifying goods;
- (c) the amount of the direct payments;
- (d) any restrictions on how a direct payment may be spent
- (e) the dates for payments into the account by the local authority, and whether this will be by lump sum or by instalments.

(3) The agreement must contain confirmation from the person to whom direct payments are being made that they will

- (a) use the direct payment to secure the agreed provision;
- (b) notify the local authority if any relevant circumstances change in a way which would impact on the need for the agreed provision;
- (c) ensure that the bank account approved by the local authority is
  - (i) used solely for the purposes of these direct payments or for these direct payments and either or direct payments made pursuant to the Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2009 or the National Health Service (Direct Payment) Regulations 2013; and
  - (ii) only accessible by the person to whom the direct payment is being made or any other person approved in writing by the local authority.
- (d) keep a record of money paid in and withdrawn from the account mentioned in paragraph (c) and, on request, or at intervals specified by the local authority, provide the local authority with evidence relating to
  - (i) the account; and
  - (ii) the agreed provision

(4) Where a nominee is to receive a direct payment, the agreement must also include—

- (a) confirmation that the child’s parent or young person agrees with how the direct payments are intended to be used; and
- (b) confirmation from the nominee that the nominee will be responsible as a principal for all contractual arrangements entered into for the benefit of the child or young person and secured by means of direct payment. Permission of school, or post-16 institution

**11.**A local authority may not make a direct payment in respect of agreed provision which will be used or provided in a school **(a)** or post-16 institution **(b)** unless the head teacher, principal or the person occupying an equivalent position at the school or that institution agrees.

## Amount of direct payments

**12.**—(1) The local authority must ensure that the amount of the direct payment is sufficient to secure the full cost of the agreed provision.

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**(a)** School is defined in section 4 of the 1996 Act

**(b)** “Post-16 institution” is defined in section 72(2) of the 2014 Act

(2) The local authority may increase or reduce the amount of the direct payments provided that the authority is satisfied that the new amount is sufficient to secure the full cost of the agreed provision.

(3) A local authority may reduce the amount paid by way of direct payments by an amount not exceeding the amount due in respect of a period for which a payment falls to be made where—

- (a) direct payments have accumulated and remain unused; and
- (b) the local authority considers it is reasonable to offset the monies accumulated against the outstanding amount to be paid for that period.

**13.—**(1) Where the local authority is notified or becomes aware of a change in circumstances which may affect whether the amount of the direct payments is sufficient to secure the agreed provision, it must consider whether that amount is sufficient.

(2) Where the local authority is satisfied that the amount of the direct payment is not sufficient to secure the full cost of the agreed provision, it must increase the amount of the direct payments to ensure that the amount sufficient to secure the full cost.

### **Monitoring and review of direct payments**

**14.—**(1) The local authority must monitor the use of direct payments by persons to whom direct payments are made.

(2) The local authority must review the making and use of direct payments whenever any changes are made in relation to the qualifying goods and services and in any event—

- (a) at least once within the first three months of direct payments being made;
- (b) at the end of the period of one year from which direct payments start being made; and
- (c) at appropriate intervals thereafter not exceeding twelve months.

(3) If the person to whom direct payments are being made requests that the local authority carry out a review of the making and use of—

- (a) the local authority must determine whether it is appropriate to carry out a review based on the circumstances; and
- (b) if the local authority determines that it should carry out a review, then it must conduct the review as if it was a review in accordance with paragraph (2).

(4) When carrying out a review, a local authority must consider whether

- (a) it continues to be appropriate to secure the agreed provision by means of direct payments;
- (b) the direct payments have been used effectively;
- (c) the amount of the direct payments continues to be sufficient to secure the agreed provision;
- (d) it is still satisfied as to the matters set out in regulation 6; and
- (e) the person receiving the direct payments has complied with the obligations imposed on them under the agreement described in regulation 10.

**15.** Following a review the local authority may—

- (a) substitute the person receiving the direct payment with a nominee, the child's parent or the young person, as appropriate;
- (b) increase, maintain or reduce the amount of the direct payments;
- (c) require the person receiving the direct payment complies with either or both of the following conditions—
  - (i) that the person must not secure a service from a particular person,
  - (ii) the person must provide such information as the local authority considers necessary;
- (d) stop making direct payments;
- (e) take any other action which the local authority considers necessary.

### **Reducing, stopping or increasing the amount of a direct payment**

**16.—**(1) Where the local authority decides to increase or reduce the amount of direct payment or to stop making a direct payment it must provide reasonable notice in writing to the person receiving the direct payment.

(2) Where the local authority decides to reduce the amount of or to stop making the direct payment, it must give reasons for this in the notice.

(3) On receipt of a notice in accordance with this regulation, the person receiving the direct payment may request the local authority to reconsider its decision.

(4) When conducting its reconsideration, the local authority must consider the representations made by the person who was receiving the direct payments.

(5) The local authority must provide written reasons to the person receiving the direct payments of the decision of any further reconsideration.

(6) A local authority may not be required to undertake more than one reconsideration of a decision.

(7) The local authority may reduce or stop making direct payments following reasonable notice despite the fact that further reconsideration has been requested as per paragraph (3)

### **Repayment and recovery of direct payments**

**17.—**(1) A local authority may require that part or all of a direct payment must be repaid to the local authority, if satisfied that it is appropriate to require repayment having regard in particular to whether—

- (a) the circumstances of the child or young person have changed in a manner which has a significant impact on the appropriateness of the agreed provision;
- (b) all or part of the direct payments have not been used to secure the agreed provision;
- (c) theft, fraud, or another offence may have occurred in connection with the direct payments;
- (d) the child or young person has died.

(2) The local authority may only seek repayment of any portion of the direct payments that has not already been spent on agreed provision.

**18.—**(1) When a local authority decides that all or part of a direct payment must be repaid, the local authority give reasonable notice in writing to the person receiving the direct payments, setting out—

- (a) the reasons for the decision;
- (b) the amount to be repaid; and
- (c) the time within which the sum must be repaid.

(2) On receipt of a notice under paragraph (1) the person receiving the direct payment may request the local authority to reconsider its decision.

(3) When conducting its reconsideration, the local authority must consider any representations made by the person who was receiving the direct payments.

(4) The local authority must provide written reasons to the person receiving the direct payments of the decision of any reconsideration, and where the local authority determines that direct payments must be repaid, then the written reasons must include the information in paragraph (2).

(5) A local authority may not be required to undertake more than one reconsideration of a decision.

(6) The local authority may waive any requirement to repay all or part of a direct payment.

(7) Where a local authority requires all or part of a direct payment to be repaid, that sum may be recovered as a debt due to the local authority.

### **Transition – when a child becomes a young person**

**19.**—(1) When a child in respect of whom direct payments are being made becomes a young person the local authority must take reasonable steps to ascertain whether the young person would like to receive and manage direct payments themselves.

(2) Where the young person wishes to receive and manage the direct payment themselves, the local authority must follow the process set out in regulation 6 and regulation 10 to ascertain whether it is appropriate for the young person to manage and receive direct payments.

(3) Where the young person requests in writing that the local authority continues to make direct payment to the young person's parent or that parent's nominee, the local authority must do so.

(4) Where the young person notifies the local authority in writing that they do not consent to the making of direct payments, the authority must stop the direct payments as soon as reasonably practicable.

### **Stopping making direct payments**

**20.**The local authority must stop making direct payments if—

- (a) the person receiving the direct payments no longer consents to do so;
- (b) the person receiving the direct payments ceases to be a person to whom direct payments may be made under regulation 3(2);
- (c) a nominee who receives payments is no longer meeting the conditions in regulation 4;
- (d) following a review under regulation 14, it appears to the local authority that the person receiving the direct payments is not using those payments to secure the agreed provision;
- (e) following a review under regulation 14, it appears to the local authority that the agreed provision can no longer be secured by means of direct payments;
- (f) at any point the local authority becomes aware that the making of direct payment is—
  - (i) having an adverse effect on other services which the local authority provides or arranges for children and young people [in its area] for whom it maintains EHC plans; or
  - (ii) is no longer consistent with the authority's efficient use of resources.

## **SCHEDULE**

### **Persons to whom direct payments may not be made**

The following persons may not receive direct payments

(a) a person who is subject to a drug rehabilitation requirement, as defined by section 209 of the Criminal Justice Act 2003<sup>(a)</sup>, imposed by a community order within the meaning of section 177 of that Act or by a suspended sentence order within the meaning of section 189 of that Act;

(b) a person who is subject to an alcohol treatment requirement, as defined by section 212 of the Criminal Justice Act 2003, imposed by a community order within the meaning of section 177 of that Act or by a suspended sentence order within the meaning of section 189 of that Act;

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(a) 2003 c.44; section 209 was amended by paragraphs 71 and 88 of Schedule 4 to the Criminal Justice and Immigration Act 2008 (c.4).

(c) a person who is released on licence under Part 2 of the Criminal Justice Act 1991<sup>(a)</sup>, Chapter 6 of Part 12 of the Criminal Justice Act 2003 or Chapter 2 of Part 2 of the Crime (Sentences) Act 1997<sup>(b)</sup> subject to a non-standard licence condition requiring the offender to undertake offending behaviour work to address drug-related or alcohol related behaviour;

(d) a person who is required to submit to treatment for their drug or alcohol dependency by virtue of a community rehabilitation order within the meaning of section 41 of the Powers of Criminal Courts (Sentencing) Act 2000 or a community punishment and rehabilitation order within the meaning of section 51 of that Act<sup>(c)</sup>;

(e) a person who is subject to a drug treatment and testing order imposed under section 52 of the Powers of Criminal Courts (Sentencing) Act 2000<sup>(d)</sup>.

(f) subject to a youth rehabilitation order imposed in accordance with paragraph 22 (drug treatment requirement) of Schedule 1 to the Criminal Justice and Immigration Act 2008 which requires the person to submit to treatment pursuant to a drug treatment requirement.

(g) subject to a youth rehabilitation order imposed in accordance with paragraph 23 (drug testing requirement) of Schedule 1 to the Criminal Justice and Immigration Act 2008 which includes a drug testing requirement.

(h) subject to a youth rehabilitation order imposed in accordance with paragraph 24

(intoxicating substance treatment requirement) of Schedule 1 to the Criminal Justice and Immigration Act 2008 which requires the person to submit to treatment pursuant to an intoxicating substance treatment requirement.

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(a) 1991 c.53.

(b) 1997 c.43.

(c) 2000 c.6. Sections 41 and 51 were repealed, with savings by Schedule 37 to the 2003 Act.

(d) Section 52 was repealed, with savings, by Schedule 37 to the 2003 Act.