

Our Ref: KA/HF/DUTTON/01412-003

Your Ref:

10 January 2014

Budget Views

BY EMAIL: budget.views@birmingham.gov.uk

Dear Sirs

RE: Consultation: Planning Birmingham's Future and Budget Consultation 2014/15

We have been consulted on behalf of a number of adults with significant learning disabilities in connection with this consultation ('the Budget Consultation'). They do not have sufficient mental capacity to seek assistance and advice themselves, and we have been consulted, on behalf of each, by a parent. Their names, addresses and the parent acting for them are as follows:-

Samantha Dutton (Susan Dutton – parent)
120 Clarence Road
Four Oaks
Birmingham
B74 4AU

Jennifer Gilbert (Lynda Gilbert – parent)
120 Lichfield Road
Four Oaks
Birmingham
B74 2TA

Lee-Simon Howell (Carole Howell – parent)
Rivendale
Marsh Lane
Erdington
Birmingham

Matthew Hull (Hazel Hull – parent)
10 The Willows
Walmley
Sutton Coldfield
B76 2PX

Nicholas McKelt (Tracy Bishop – parent)
93 Gibbons Road
Four Oaks
Birmingham
B75 9HB

Marc Sirett (Tina Sirett – parent)
410 Stockfield Road
South Yardley
Birmingham
B25 8JJ

Noel Wheatle (Delores Wheatle – parent)
23 Philip Victor Road
Handsworth
Birmingham
B20 2QB

As indicated above, each of our clients has severe learning disabilities, and many of them have multiple disabilities, including physical and sensory disabilities. Some of our clients are currently in residential care placements, and others live in the family home with service support provided either by services arranged by the Council, or arranged through direct payments. Some of the services provided are Council-run services, and some provided under contract with private sector organisations. Each of our clients therefore, has concerns about different aspects of the current proposals, including some shared, and overlapping, concerns.

Our first, overarching concern is the nature of the process, in light of the separate /additional consultation process currently underway on the specific proposals relating to adult social care ('the Adult Social Care Consultation'). We deal with this first, before turning to comments on the Budget Consultation proposals, and then, insofar as it is currently possible to do so, some comments on the Adult Social Care proposals.

The nature of the consultation process

The Budget Consultation comes to an end on 10 January 2014. The purpose of the consultation paper is set out on page 4:-

“To consult on the 2014-15 City Council budget. Please note that this document sets out broad issues for the corporate consultation and the overall budget position. There will also be specific consultation on different services.”

Some of our clients have received a letter to advise them that they will “*have an opportunity to ask questions and to hear more detail about the Adults and Communities’ proposals*” in the consultation being undertaken on the latter between 2 January and 17 February 2014. We understand this to be the “*specific consultation*” in relation to Adult Social Care to which reference is made on page 4 of the Budget Consultation paper.

Our concern is this. Clearly, the response of consultees to the Adult Social Care Consultation, will be relevant to decisions made about the budget, and the resource allocations it makes. We understand that the Council is to make its final decision on the budget on 17 February 2014, the date of closure of the Adult Social Care Consultation. In light of the timetables for these two

processes, it would appear that there is no intention to take into account the responses to the latter consultation when making those resource allocation decisions and indeed it would certainly be impossible to consider any responses that were made on 17 February but within the consultation deadline. This is consistent with the description of the consultation processes as stages:

“Consultation will take place in the following stages:

- 1. Corporate Consultation and Equality Impact Assessment to assist with budget and resource allocation.*
- 2. Directorate Consultation and Equality Impact Assessment on the consequences of implementation of relevant proposals.”*

(See page 53 Appendix 1 *“The Consultation Process”*).

This suggests that the responses to the Directorate consultations are not to be taken into account for the purpose of determining budgets and resource allocation. This is despite the fact that they will seek information on the impact of the proposals which is clearly relevant to any Equality Impact Assessment undertaken for the purpose of assisting with the resource allocation decisions. We are writing to the Council’s Director of Adult Services and Legal Department in respect of these concerns, and seeking an assurance that there will be sufficient flexibility and contingencies in the approved budget to allow for a decision that any or all of the Adult Social Care proposals will not be implemented.

The Council’s priorities

The consultation paper makes clear that local facilities and services may be discontinued and those decisions will be informed by a set of priorities which are determined by the Council’s *“overall mission and the priority outcomes that flow from that”*. The *“mission”* is entitled *“A Fair City, A Proposerous City and A Democratic City”*. The paper goes on to say:-

*“Services will be prioritised according to their importance in reaching these goals and we will protect the most essential services from cuts as far as we possibly can. These are **services for children, social care for older people, and essential environmental services such as refuse collection.**”* (See Summary) [Emphasis added.]

We understand that the issue of priorities is a matter on which the Council is consulting. Page 54 under the heading *“Questions to consider”*, says that the Council wants consultees to say what they think about the *“Priorities and principles”* as well as the *“plans for change”*.

There is absolutely no explanation of how the Council has selected these particular services (for children, social care for older people, and environmental services such as refuse collection) as the most essential services that will receive the maximum level of possible protection from cuts. It is, therefore, very difficult to respond on this issue. However, what is absolutely clear is that younger adults with care needs, in particular those with significant learning disabilities who are not able to protect their own interests, are as vulnerable as children and older people and the services for them are equally essential to protect them from serious adverse consequences to their health and wellbeing.

There is some acknowledgment that social care for adults should be treated as essential at page 10 of the document. In the context of describing what is called Stage 3 of the Council’s

approach the “*essential (highest priority) services*” listed are (1) statutory and non-statutory services for the protection of children (2) essential environmental services, such as refuse collection and (3) social care for adults with substantial and critical needs. What is unclear is whether the description of priorities found in the Summary and quoted above is intended to summarise the list on page 10, or whether it is an overarching, higher level set of priorities which will inform decision-making. If it is intended merely to be a summary, but is simply inaccurate, this needs correcting to ensure that decision making in the future does treat social care services for adults as being essential services, and does not restrict this level of prioritisation to the sub-category of social care for older people.

The Adult Social Care Proposals

We are intending to advise and assist our clients further to respond to the Adult Social Care Consultation. More information is required about the detail of many of the proposals, and we hope that the opportunity offered by this further consultation process to ask questions and to find out more details will provide that information. We, therefore, stress that the comments made below are simply initial comments and are unlikely to stand as the full response to the consultation on these proposals.

Proposal 3 : Changes to Internal Services – Learning Disability Day Care

We understand the proposal here is to use vacancies in the Council’s own day centres instead of contracting with the private sector. It is unclear whether it is suggested that those who currently use private sector provision might be required to move to the Council’s day centres. If this is the case, there is no evidence of any awareness of the potential impact on those affected. The only adverse impact that is identified is one on providers.

Day centres provide only a venue for organised activities, but establish communities. Those who attend day centres rarely have the opportunity to be part of a community, and to develop social relationships outside of their families. This is why day centres are so important to those who use them. Service users may well have attended the same day centre for many years, building up relationships both with peers and staff. A move from an existing day centre to a new one would clearly engage Article 8 (the right to respect for an individual’s private life) but there is no acknowledgment that this may, in fact, restrict the possible savings to be made with this proposal.

We note that there is no explanation of how the projected savings have been calculated. For a calculation to have been made the Council must have made some projections based on how the proposal is to be implemented. Without this information it is impossible to comment fully on the proposal.

Proposal 4 : Expansion of Internal Services – Shared Lives

This proposal is to expand the number of Shared Lives placement by 179 by 2016/17, achieving savings compared to the use of care home placements. This will affect not only new service users, but also existing service users who may be required to move from existing care homes, or their own home, into a Shared Life placement.

Furthermore, such a placement is inherently riskier for a vulnerable adult who is unable to protect themselves from harm. In a care home, not only is the placement fully regulated by the Care Quality Commission which has powers of entry, but there are “*many eyes*” of staff and

visitors who are able to raise the alarm if there are concerns about the quality of the service or abuse.

This proposal has very serious implications indeed. It involves moving people from their own homes (be that a care home, or a family home) and, again, clearly engages Article 8. Furthermore, it will inevitably involve a move from a relatively stable care arrangement to one which is less secure. If an adult with learning disabilities is living with a family, who are able, at any point, to terminate their contract with the local authority, the placement will always be insecure. Changes in the circumstances of the host family (which are inevitable over any reasonably lengthy period) will always place the placement at risk.

The identification that a very specific number (179) shared lives placements will be created suggests very clearly that the Council has a very clear idea about how the proposal is to be implemented and who it is likely to affect. That information needs to be made available to consultees so that those most likely to be affected have a fair opportunity to comment.

Proposal 6 : Enabling specialist care services to operate outside the council

We made some representations about this issue in response to the Green Paper review, on behalf of our client Jennifer Gilbert. The proposal involves the transfer of the running of Specialist Care Services (which include Council day centres) to a co-operative "*which would not be wholly owned by the Council*". The reason given is that this would create a "*potential to achieve the trading surplus either by reducing costs or increasing income*".

There is absolutely no explanation of why it is thought that it would be possible to reduce the costs of running the day service if it were run by a cooperative, rather than the Council. On the face of it, there is no logical reason why this would be the case. There is also no explanation of why it is thought that it would be possible to increase income under this arrangement.

In the Green Paper it was suggested that the arrangement would allow day centres to trade outside the council, including selling spaces to other local authorities and self-funders. We were told that it would not be lawful for the Council to 'trade' in this way which is why a transfer to a social enterprise was under consideration. The Council has wide - and we believe sufficient - powers to charge for the use of its day centre services by self-funders and other local authorities. There is no legal impediment to doing so.

Insofar as charging other local authorities is concerned, section 29 of the National Assistance Act 1948 permits local social services authorities to establish and run day centres. Section 32 provides for financial adjustments between an authority providing a section 29 service and an authority in which a service user is ordinarily resident and which is, therefore, responsible for the provision of their community care services. Furthermore, local authorities now have broad powers under the Localism Act 2011 to do things for a commercial purpose and also to charge for things done in the exercise of its general powers.

In short the Council has the same opportunities to reduce costs and raise income as a cooperative venture. By way of contrast, there are many disadvantages of transferring ownership, and there is no mention of these in the consultation materials. In particular, if the service were to remain in Council hands, the Council would have greater flexibility in terms of accessible resources to maintain the day centre through periods of financial difficulty. Furthermore, the Council would be able to plan in a more strategic way. For example, if usage of day centres were to decline there might be sufficient to sustain two of the three day centres

and a decision on this reorganisation could be made in a planned way if all three were still run by the Council. Their transfer to a social enterprise might lead to decision-making on an individual centre basis, driven primarily by the concerns of the operating organisation, and might lead, ultimately, to a situation where there was inadequate provision.

Proposal 7 : Further reduction in younger adult care packages

We understand that this proposal involves the reassessment of existing services users and assumes that it will be possible to meet their eligible needs in a way that will cost the Council less. Very large savings are predicted from this exercise, totalling approximately 20% of the existing budget by 2016/17. This represents very significant reductions in care packages. There is no explanation of why it is thought that such significant savings are possible. There is a reference to the Council having undertaken some “*modelling*” based on younger adults with a learning disability, there is no explanation of what this “*modelling*” involve, and so consultees are unable to identify whether there are (legal or factual) flaws or misjudgements in the process to be adopted.

In the Fact Sheet on this proposal, there are indications that it rests on a misunderstanding of the Council’s legal obligations. It identifies as a potential adverse impact the fact that it may place “*greater burdens upon family carers*”. This suggests that the Council anticipates that some of what are currently eligible needs may, in the future, be met by family carers. However, in assessing eligible needs, a local authority is only entitled to rely on the care contribution of family carers if they are both willing and able to provide that care. It is not open to the Council to impose “*greater burdens*” on such carers.

Furthermore, the assessment materials currently used give rise to a serious risk that unmet eligible needs will not be identified. The current descriptors used in the assessment documentation do not properly or lawfully reflect the statutory guidance on identifying eligible needs.

Proposal 8 : Joint adults and children’s approach to transitions

This proposed that young people aged 18 to 25 years who have already moved into adult services will be reassessed, and it is, apparently, anticipated that this will lead to savings on their current care package. Again, it is suggested that one source of those savings is the imposition of “*greater burdens upon family carers*”. We would, therefore, repeat the points that we have made in relation to proposal 7 both in relation to carer contributions, and the adequacy of the assessment materials currently used.

Yours faithfully

Public Law Solicitors