Private & Confidential

Advice note: Birmingham City Council, Care Homes Tender (under 65s) ("the Service")

1. INTRODUCTION

The purpose of this advice note is to enable members to position themselves to respond to threats made by Birmingham City Council ("the Council") to transfer service users from their facilities to other services. If providers do not tender or have placements which are "out of city", the threat is that service users will be transferred with effect from 1 May 2018.

The note covers:

- the provider's rights;
- the rights of the individual and how providers can help them assert those rights; and
- the implications, when different, for providers who operate outside the boundaries of Birmingham City.

2. BACKGROUND

As members are aware, the Council published a tender for the Service in December 2017/January 2018 ("the Tender"). The Tender deadline was 05 February 2018. The Tender document concluded by explaining to providers that if they *"decide not to complete the tender process, the Council will be unable to make any new placements with your service and we will start the process of moving existing service users to a new contracted provider after 1 May 2018".* This means that existing residents within the services run by providers who have not completed the Tender, will be moved to new services. The fee proposals contained in the Tender were unacceptable to a number of providers who have, as a result, not tendered for the services. The Tender also suggests that the Council will either be terminating "out of city" placements, or not offering providers any fee increases for those placements in future.

This advice note is intended to be used by providers who have not responded to the Tender, or who have "out of city" placements. It can be shared with individual service users and family members.

Please note this advice note only covers residential care services, not supporting living which is subject to a different regime.

3. PROVIDERS

Options for providers to consider in the circumstances fall into the following categories:

- contractual rights;
- maximisation of fees pending placements being terminated;
- empowering residents and their families to exercise their choice to remain in their existing home.

We set out below advice on each aspect.

3.1 Contractual rights

The starting point for providers is to look to the terms of their existing contract with the Council (if they have one). Where there is no written contract a possible approach is set out below.

The relevant terms which the Council will be obliged to abide by may include:

- notice of termination – providers should hold the Council to the strict requirements set out;
- length of notice – this may not be specified, in which case "reasonable" notice would be required – this would be assessed by reference to all the circumstances, including what time it would take the Council to find alternative provision;
- the application of TUPE - this may have been predicted by the contract and, if it could be relevant, detailed consideration of the consequences would be necessary;
- the right to access information held on behalf of or about the service user;
- if individual service funds are in place (because these are residential care placements, Direct Payments will not be available), how the terms of such arrangements interact with the termination provisions would need to be looked at;
- placements may have been subject to specific agreements dealing with each individual; if this is the case those contracts should also be addressed.

At every stage in the process, providers should ask themselves what the rights are of the Council to take the steps they are proposing and to put the Council to proof of their entitlement to do so by asking for the justification to be put in writing.

3.2 Maximising the fees due

Given that the Council has indicated its intention to transfer individuals and, even for individuals remaining in a service, to reduce the fees payable for them, any reluctance to assert the right to be paid properly for the placement is likely to be reduced and the approach taken by the Council gives providers a good opportunity to be more assertive about the rates.

If the situation of members is materially affected by potential obligations to pay for "sleep-ins" liabilities either currently or for historic liabilities, we have produced a separate toolkit which is available to Care England members for £795 plus VAT.

If, however, the shortfall in fees simply represents a failure to meet actual costs, even if this only applies by virtue of no uplift having been offered for the current (17/18) and next (18/19) financial years, it would be worth asserting the right to be paid properly for the services being provided.

The process that would need to be undertaken, assuming there is no workable variation clause or fee-uplift mechanism in your contract, involves giving the Council notice terminating the current arrangements and offering to continue the placement on the basis of new terms, including higher fee rates. Care is needed to ensure that the way in which this is done maximises the prospects that the new rates will apply. The process risks the Council accepting the notice of termination and therefore may result in the removal of the individual either immediately or at such time in the future that the Council has arranged an alternative placement. Careful judgement should be exercised to determine whether to give notice or not.

If there is a fee review mechanism in the contract, this should be considered.

3.3 Out of city placements

Very similar provisions apply to out of city placements to those referred to above. Additional aspects are:

- the even harsher tone expressed concerning fee-uplifts and the intention of the Council to move the individual back to Birmingham;

- individuals may have formed links with the local community which mean their best interests will be served by remaining in your facility – this is likely to be more relevant if they have been with you for a long time;

- the Council could achieve very significant savings if the care assessments made before any placements showed that a supported living environment was more suited to meeting the assessed needs; as a result of a change in setting, the funding for the individual may become the responsibility of the "local", local authority; the Council may therefore seek to put providers under pressure to redesign services so they are classed by CQC as supported living.

4. INDIVIDUALS

The Care Act gives individuals clear rights and the following are examples of the rights which may be relevant when challenging proposals to move them from their current home made by the Council. Before any service user is moved to an alternative placement, an assessment under the Care Act must be carried out by an appropriately trained assessor, (with relevant experience of the presenting issues for the individual), who will consider a number of factors, such as:

- the person's needs and how they impact on their wellbeing;
- the outcomes that matter to the person; and
- the person's wider circumstances.

The tender included details of the examples of needs that might be assessed and providers will be familiar with the range of such assessments. The Council cannot commence any process which might involve the transfer of an individual to another service before the detailed care assessment has been undertaken (and preferably agreed with the individual.

Providers can be reluctant to assert the rights of individuals in their care because they fear being accused of having a conflict of interest but, whilst it will always be better if the rights set out below are asserted by the individual and their families, if the individual has no-one else available it is a legitimate approach for the provider to take on that role, at the very least to ensure the person has a suitable advocate appointed.

4.1 Care Assessments

In carrying out an assessment, a reassessment or a care and support plan review, the local authority must:

- involve:
  - the adult themselves as fully as possible;
  - any carer the adult has;

  - any person the adult asks to be involved or (if they lack capacity) anyone who is interested in the adult's welfare which may therefore include the provider;

- consider the outcomes that the adult wishes to achieve in day-to-day life;

- arrange for an independent advocate to be available to represent and support the individual where without an advocate the person would experience substantial difficulty in:

  - understanding relevant information;
  - retaining that information;
  - using or weighing information as part of the process; and/or
  - communicating their views, wishes or feelings.

  failure to provide an independent advocate may render the assessment unlawful;

- where mental capacity is an issue, carry out an assessment of capacity and consider appointing an Independent Mental Capacity Advocate;

- where there are communication barriers consider involving a specialist interpreter;

- take into account the impact of the process on the individual and the person's preferences as to timing, location and medium through which the process is carried out; and

- give a written record of the assessment/review to the adult, all those involved in the process and anyone the individual asks the Council to give a copy to, again including the care provider when appropriate.

Under the Care Act the Council's resources and the financial position of the individual are irrelevant to:

- the assessment of needs; and

- whether someone is eligible to have those needs met.

A duty to reassess before reducing services is not discharged by sending care users a pro forma letter inviting them to seek a reassessment or anything which falls short of a formal, compliant reassessment.

4.2 Care and Support Planning

Once an assessment has taken place, a care and support plan must be drawn up. For this to be lawful, the adult themselves, the carer and any other relevant person should be involved. The Council should take all reasonable steps to reach agreement with the adult whom the plan is being prepared, about how the Council should meet the needs in question.

It is mandatory for a care and support plan to include the personal budget for the person concerned. The amount of the personal budget should be:

- arrived at co-operatively with the service user and other relevant persons;
- transparently reached and adequately reasoned;
- sufficient to meet the assessed needs

4.3 Preferred accommodation

The Council must arrange for an individual to be accommodated in the accommodation of their choice when:

- the preferred accommodation is the same type as that specified in the individual's care and support plan; it is suitable to the that person's needs; it is available; the provider agrees to provide the accommodation on the Council's usual terms (being those they are currently able to place people under) and if any cost above the person's personal budget will be met by a third party.

Choice on accommodation and the need to pay additional costs apply equally to those who have already been receiving care.

If there is only one suitable location from which the services required can be provided, then the Council will be obliged to pay the full costs (without any top-up).

4.4 Best interests

If the Council claim that moving a resident without the necessary mental capacity, is in their best interests, the resident is entitled to challenge that decision through the Court of Protection. However, the Court of Protection will not carry out their own assessment of what is suitable; they will only choose between the available choices, which may not include the existing placement.

4.5 Direct payments

Using the information from the personal budget, in certain circumstances the person can ask the local authority for a direct payment, but as the Council is not identified as currently able to provide direct payments for care home accommodation, direct payments will not be available in these circumstances.

4.6 Financial resources

The Council can also take its own financial resources into account when it decides how an individual's needs should be met - if there are a range of options which are suitable to meet the assessed needs, it can choose the cheapest alternative. This will be relevant given the Council's stated aim of reducing its costs; however, cost must not be the only driver and when deciding how to meet needs, the Council:

- must act reasonably;
- cannot set arbitrary upper limits on the costs it is willing to pay;
- must take into account the individual's preferences;
- must choose an option which can deliver the assessed outcomes identified by or for the individual in the care assessment; and
- should not set arbitrary upper limits on the costs it is willing to pay for particular types of care (such as residential care);

  doing so would not deliver an approach that is person-centred or compatible with public law principles.

It is unlawful for a council to reduce care provision simply because of budgetary pressures.

The courts will often bring a more intense scrutiny to bear on assessments that appear to seek to reduce care services, for budgetary reasons.

4.7 Consultation

Care home residents are entitled to be consulted before their care service is terminated. Such challenges that have been brought but such attempts have rarely succeeded. The grounds most likely to succeed involve complaints that:

- the decision had already been taken;
- inadequate time was given for considered responses;
- officers failed to provide consultees and/or decision makers with accurate; information about the risks and benefits of closure;
- the local authority failed to consult over realistic alternatives.

4.8 Cooperation

One additional duty introduced by the Care Act is the duty on local authorities to cooperate with providers. This states that local authorities:-

- must co-operate with "relevant partners" in exercise of functions. Relevant partners are:
  - providers;
  - health bodies;
  - registered provider of social housing;
- must make arrangements for ensuring co-operation between officers of relevant partners; and
- where in receipt of a request from a relevant partner must comply with that request unless it considers doing so would:
  - be incompatible with its own duties; or
  - otherwise have an adverse effect on the exercise of its functions.

The nature of this duty, and the extent to which providers could place any reliance upon it, have recently been tested in the Courts and it has been described as only a "needs" duty, making it hard to rely on it.

The above is a brief summary of the rights of individuals, and it would be necessary, in each case, to assess how best those rights should be asserted against the Council, if they were being breached. Ideally, providers will be able to mobilise the relevant friends and families to take up the fight on behalf of the individual, but there can be no harm in providers highlighting these duties (and breaches of them) in the context of the Council's proposal.

If you have any questions please contact John Wearing or Emma Watt on 0121 212 7402 or email john.wearing@anthonycollins.com or emma.watt@anthonycollins.com.

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