

Report to the Cabinet Member for Adult and Community Services
Report submitted by: Head of Service, Policy, Information and Commissioning
(Age Well)
Date: 11 May 2016

Part I

Electoral Divisions affected:
All

Learning Disabilities: Supported Living and Domiciliary Care Fees for 2016/17

Contact for further information:

John Sleightholme, 07824081657, Financial Intelligence Manager (Age Well),
John.sleightholme@lancashire.gov.uk

Executive Summary

The County Council commissions and funds domiciliary and supported living services for approximately 1,800 people with a learning disability, helping them to live independently with their family or on their own. In-house services support approximately 300 people with the remainder being supported by a range of independent service providers, many of which are not for profit organisations.

The County Council currently pays providers at a ceiling rate of £37.19 per sleep-in shift and £13.38 per waking hour. This report sets out the legislative basis and the financial context and analysis underpinning the award of uplifts to these rates with effect from 1st April 2016 for the 2016/17 financial year. It recommends an uplift in 'sleep-in' rates to ensure legal compliance, holding other rates at their 2015/16 levels, and funding the costs of this uplift from reserves.

This is deemed to be a Key Decision and the provisions of Standing Order No. 25 have been complied with.

Recommendations

The Cabinet Member for Adult and Community Services is recommended to approve:

- (i) A change in sleep in payments from £37.19 per shift to £8.58 per hour with effect from 1st April 2016; and
- (ii) Retaining the existing waking hourly rate at £13.38 until the completion of a new procurement exercise scheduled during 2016/17.

Background and Advice

Services for people with learning disabilities in Lancashire are provided to approximately 3,000 people and incur a total spend by the County Council in the order of £110 million per year.

The County Council funds approximately 1,800 people with a learning disability in a supported living or domiciliary care setting. In house services support approximately 300 people with the remainder being supported independent service providers.

The County Council currently pays providers at a ceiling rate of £37.19 per sleep in shift (staff are permitted to sleep during this period but are required to get up and respond to clients' needs as appropriate) and £13.38 per waking hour.

2016/17 Uplift

- Funding Context

The County Council is faced with a significant shortfall in overall funding during the next five years as demand and cost pressures are forecast to continue to increase. The demand pressures will be addressed through the Adults Transformation work and may be alleviated to an extent by changing models of service delivery. However this report focuses on ensuring rates for the existing service models are set at a level which is affordable for the County Council, but are also commensurate with meeting the real costs to providers of delivering their services.

- Sleep in shifts

Following a successful employment tribunal appeal (Whittlestone vs BJP Homecare), providers are legally obliged to pay staff at minimum wage during sleep-in shifts. The judge presiding over the case ruled that the employee was required to complete sleep-in shifts as part of their work and this requirement meant that the shift should count towards "time-worked"; time worked should be paid at the equivalent of minimum wage (or higher). It is possible to pay staff at a lower rate than minimum wage for some shifts, as long as the overall average pay during a pay reference period¹ equates to living wage.

Prior to April 2016 the County Council maintained a position that the combination of rates paid for waking hours and sleep-in payments were sufficient to allow providers to meet their legal obligations. With the implementation of National Living Wage of £7.20 per hour for over 25 year olds on 1st April 2016, this position is no longer valid. Furthermore, paying staff the equivalent of living wage for all hours worked during a pay reference period could lead to providers facing future legal challenges. For example, an employee with a contract of employment stating £7.50 per hour but

¹ Pay Reference period: The pay reference period (PRP) is the period by reference to which a worker is paid and is the basis of calculating whether the national minimum wage (NMW) has been paid. The worker does not have to be paid the NMW for each hour worked, but in general must be paid the NMW on average for the time worked in the PRP

actually receiving £7.20 on average may take legal action on the grounds of breach of contract.

As a result of the current legislation, the County Council must reflect National Living Wage in its 'sleep in' payment.

During March 2016, discussion with the Lancashire Learning Disability Consortium (LLDC) who represent voluntary sector providers, combined with provider information gathered during the postponed 2015 tender exercise, indicates that providers operate sleep in shifts of different lengths (varying between 8 and 10 hours, averaging at 9.5 hours across the sector) and the County Council's fee should be based on an hourly rate rather than a flat fee. Based on this evidence the County Council proposes an hourly rate of £8.58 for sleep in shifts.

The financial implications of reflecting the National Living Wage (over and above an inflationary increase) in sleep-in payments is an increased cost pressure of £3.5 million in 2016/17 and £3 million in 2017/18.

The impact of paying staff the same amount to sleep or be awake to work and the associated financial impact to the County Council questions the sustainability of this model of support. The County Council will therefore require providers to consider and implement alternative methods of delivery; such as increased use of Telecare and zonal mobile night time support.

- Hourly Rate

Consultation with providers and the Lancashire Learning Disability Consortium (LLDC) indicates the sector is looking for an inflationary increase with effect from 1st April 2016. The County Council has evidence that certain providers are sustainable at an hourly rate lower than £13.38 provided sleep in fees reflect the National Living Wage as proposed in this report. When combined with the fact that a significant factor behind the decision to postpone the 2015 tender was the hourly rate, the County Council is not proposing to adjust the rate at this time. Instead, the Council is proposing to address the issue of an appropriate hourly rate as part of a new procurement process to be completed during 2016/17.

Consultations

As noted earlier the County Council met with the LLDC during March. The first issue raised was that of living wage payable on sleep-in shifts, which the County Council has acknowledged and addressed via the proposed increase. Other issues raised relate to the hourly rate and will be addressed through a new procurement exercise during 2016/17.

In light of the financial pressure resulting from this proposal, the County Council will be contacting providers to formulate plans to deliver more cost efficient outcomes.

Implications:

This item has the following implications, as indicated:

Risk management

- Legal

There remains a risk associated with the relevant provisions of the Care Act 2014 in that our rates may not be considered by certain providers to be in line with the requirements of the statute. This is a risk facing all local authorities and is not specific to the County Council. However, to mitigate the risk of potential challenge under the Care Act 2014, the County Council has set a fee for sleep-in shifts that corresponds with LLDC's proposed rate during consultation.

In relation to the hourly rate for waking hours, the County Council recognises there is significant risk in setting an hourly rate and will address this via a procurement process to be completed during 2016/17.

The increase in the sleep-in rate will be reviewed in 12 months in the light of any challenges to the current legal ruling.

- Financial

In February 2016, Full Council agreed a council-wide budget that requires reserve funding of £64.1 million which is not sustainable beyond April 2018.

The initial cost of this proposal is to increase costs by £3.5 million in 2016/17. As indicated in the report, the County Council will expect providers to work with the County Council to reshape the service delivery model and offset the increased cost pressure resulting from this proposal. Any recurrent pressure resulting from this proposal will be built into the medium term financial strategy from 2017/18. The impact in 2016/17 will be funded from the transition reserve and will be no more than £3.5 million.

Waking hours account for 83.5% of Learning Disabilities supported living funding with sleep in shifts accounting for 16.5%. If this mix and method of service delivery is retained, overall volume must reduce by 4.3% in order to offset the additional cost pressure resulting from this proposal. This equates to approximately 220,000 waking hours and 7,000 sleep-in shifts.

As part of ongoing contract monitoring, providers will be expected to submit evidence that staff are paid National Living Wage during sleep in shifts. Any providers found to be paying a lower rate will be subject to payment clawback.

List of Background Papers

Paper	Date	Contact/Tel
Whittlestone v BJP Home Support Limited UKEAT/0128/13/BA http://www.employmentcasesupdate.co.uk/site.aspx?i=ed18895	N/A	John Sleightholme/ 07824081657