

<b>Commissioner Decision Report</b> 29 <sup>th</sup> July 2015	 <b>TOWER HAMLETS</b>
<b>Report of:</b> Corporate Director Children’s Social Care and Director Adults Social Care	<b>Classification:</b> Unrestricted
<b>Children’s and Adult Services – General Grants</b>	

<b>Originating Officer(s)</b>	Sajeed Patni, Children’s and Adult Resources, Finance Business Partner
<b>Wards affected</b>	All wards
<b>Key Decision?</b>	Yes
<b>Community Plan Theme</b>	A Healthy and Supportive Community

### Reasons for urgency

The report was published on 24 July 2015, which is less than five clear days between publication and consideration by the Commissioners on 29 July 2015 as is usual practice. The areas contained in this report are however significant areas in terms of service delivery and spend and would benefit from obtaining decisions on each of the areas considered in this report as soon as possible. The intention to determine the applications at the meeting of 29 July 2015 was published more than 28 days in advance of the meeting in accordance with usual practice. It is also arguable that the five clear day requirement in the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 does not apply to decisions by the Commissioners.

### Executive Summary

The report addresses a number of payments made by the Children’s Services and Adult Service directorates in respect of allowances for foster carers, adopters and special guardians (collectively referred to as “Carers’ Allowances”), Direct Payments to clients of Adults Social Care and children with disabilities and the Free School Meals provided through a payment to schools for years 3 to 6, and whether these could be grants for the purposes of the Secretary of State’s directions made on 17 December 2014, pursuant to section 15 of the Local Government Act 1999. The report also addresses the correct characterisation of the Department for Education’s (DFE) Pupil Premium Plus scheme.

It is proposed that most of these categories of payments are not grants and that they should proceed in accordance with the Council’s established practice. This applies to: carers’ allowances and payments; direct payments to service users of Adult Social Care and their carers; payments to maintained schools for free school meals for years 3 to 6; and Pupil Premium Plus for looked after children. Payments to independent schools for free school meals are considered to be grants and a

delegation is sought from the Commissioners to the Corporate Director of Children's Services to enable these payments to proceed efficiently.

### **Recommendations:**

The Commissioners are recommended:

1. To consider and comment on the proposal in the report that the following payments are not grants –
  - 1.1 Carers' allowances and payments;
  - 1.2 Direct payments to service users of Adult Social Care and their carers;
  - 1.3 Payments to maintained schools for Free School Meals for years 3 to 6; and
  - 1.4 Pupil Premium Plus for looked after children.
2. To note the Council's intent for these payments to continue in the usual way as outlined in this report.
3. In respect of payments to independent schools for Free School Meals for years 3 to 6, to authorise the Corporate Director of Children's Services to make the awards until the end of 2015/16, in accordance with the current arrangements outlined in this report.

### **1. REASONS FOR THE DECISIONS**

- 1.1 The payments dealt with in the report are made in discharge of the Council's functions in relation to children and adults. There is a need for clarity as to the correct characterisation of the various payments, to ensure they can continue to be made without risking non-compliance with the Secretary of State's directions made on 17 December 2014, pursuant to section 15 of the Local Government Act 1999. In particular, clarity is needed as to whether or not the payments are grants and thus within the responsibility of the Commissioners pursuant to the directions.
- 1.2 The allowances and payments that the Council makes in relation to children who are not cared for by their birth parents following intervention by the Council under the Children Act 1989 or the Adoption and Children Act 2002 either form a contract for service or are necessary to meet an assessed unmet need of the child for care and support and, therefore, are considered to fall outside the definition of a grant.
- 1.3 Payments to adult social care clients, and those who care for them, who receive their assessed personal budget as a direct payment in order for them to be able to manage their own care are necessary to meet an assessed and defined need for care and support and, therefore, are considered to fall outside the definition of a grant. There is an equivalent requirement to offer direct payments to the families of disabled children, or directly to disabled children aged 16 and 17, and these payments are not considered to be grants

for the same reason.

- 1.4 The Council's free school meals scheme for pupils in years 3 to 6 in primary schools in the borough complements the government's Universal Infant Free School Meals (UIFSM) programme, which covers reception to year 2. The payments are made direct to schools to cover the cost of free school meals for those children who are provided with one. The payment is made to schools, as a reimbursement of expenditure. In respect of maintained schools, the funds are transferred from one department of the Council to another and are not considered to be grants for the purposes of the Secretary of State's directions.
- 1.5 The government Pupil Premium scheme for Looked After Children is considered to fall outside the definition of a grant as the Council has no discretion in respect of paying the premium to any pupil who is assessed as being eligible.
- 1.6 The payments made to independent schools in support of the Council's free school meals scheme are considered to be grants and a delegation is considered appropriate to enable these payments to continue to be made efficiently. The independent schools are separate corporate entities and the Council has used its discretion to fund free school meals for year 3-6 pupils at these schools.

## **2. ALTERNATIVE OPTIONS**

- 2.1 The provision of allowances and payments to meet the needs of children removed from their birth parents and Direct Payments for clients of Adult Social care, their carers and disabled children and their families are covered by legislation which places a duty on the Council; there are no alternative options in relation to these areas. In respect of Direct Payments, the duty is to offer this option to all eligible individuals / families.
- 2.2 The provision of free school meals from years 3 to 6 although being considered a valuable benefit for children is not a statutory requirement. The alternative would be to cease the scheme and for children in years 3 to 6, who do not meet the requirement for a statutory free school meal, to no longer have access to a free lunchtime meal in Tower Hamlets Schools.
- 2.3 The Pupil Premium Plus is received from the DFE for the specific purpose of providing additional support for Looked after Children, the funding is for specific use for this purpose only.
- 2.4 In the event that the Commissioners do not accept that the payments for Carers' Allowances and payments, Free School Meals for Maintained Schools and Pupil Premium Plus are not grants, it is recommended that the Commissioners delegate authority to the Corporate Director of Children's Services to make the awards until the end of 2015/16, in accordance with the current arrangements outlined in this report.

- 2.5 In the event that the Commissioners do not accept that the payments for Direct Payments are not grants, it is recommended that the Commissioners delegate authority to the Corporate Director of Adult Services to make the awards until the end of 2015/16, in accordance with the current arrangements outlined in this report.

### **3. DETAILS OF REPORT**

#### **3.1 Carers' Allowances and Payments**

- 3.2 The requirements for making payments to foster carers in England are set out in the National Minimum Standards for Fostering Services and the Fostering Services (England) Regulations 2011 made under the Care Standards Act 2000. The power to prescribe minimum allowances for foster carers through regulations was included in section 49 of the Children Act 2004. Good practice guidance on the National Minimum Fostering Allowance and Fostering Payment Systems was also published in 2011 and sets out the key principles for providing effective payment systems. Almost all types of payments made to foster carers are as set out in the foster carers payments scheme and are considered to be allowances, the scheme which is published on the web, contains clear criteria for the making of payments (Appendix 1 and 2).
- 3.3 Adopting parents and those with a Special Guardianship Order are entitled to support packages to meet the needs of the child based on an assessment. The allowances paid match the element of the fostering allowance which meets the needs of the child but are means tested. Payments to adopters are governed by the Adoption and Children Act 2002 and Adoption Support Services Regulations 2005 and payments to special guardians are governed by Children Act 1989 and Special Guardianship Regulations 2005. Both of these statutory regimes have associated statutory guidance.
- 3.4 The Council has an obligation to pay foster carers, whether they are approved or unapproved. Whilst there may be some discretion as to the amount paid, the Council does not have discretion to decide not to pay. In relation to the amount, this cannot be below the National Minimum Fostering Allowance and the Council may be subject to judicial review in respect of the amount of fostering allowance which it pays. Any discretion the Council has is therefore very much limited, rather than being at large as it would be in the case of a grant. For these reasons, payments to approved foster carers are not considered to be grants.
- 3.5 In addition, payments to approved foster carers include an additional element of remuneration, which means that foster carers are being paid to carry out their caring responsibilities. This is considered to be fundamentally different in character from a grant, in respect of which the Council determines a contribution rather than paying remuneration.

3.6 Although no remuneration is generally payable to adopters or special guardians, there is a clear government framework around these allowances, which are provided to meet an assessed unmet need of the child. Regulations set out that adoption and special guardianship allowances must be paid having 'due regard' to the fostering allowances, and the courts have held that this means that the allowances must be based on the element of the fostering allowance which meets the needs of the child (*R (on the application of B) v LB Lewisham* [2008]). The regulations require that those payments are subject to a means test of the carers, as any payment is to address the unmet needs of the child and may be subject to variation in the event that the child's needs change, or the carer's financial situation changes. If the child moves out of the carer's home, the allowance ceases to be payable.

3.7 Consequently, the Council has an obligation to pay those adopters and special guardians who are eligible to receive an allowance based on the assessment. Whilst there may be some discretion as to the amount paid, the Council does not have discretion to decide not to pay where the carer is eligible. In relation to the amount, the Council may be subject to judicial review in respect of the amount of allowance which it pays, so any discretion the Council has is very much limited, rather than being at large as it would be in the case of a grant. For these reasons, payments to adopters and special guardians are not considered to be grants.

3.8 In exceptional circumstances one-off payments may be made to carers to meet the needs of children placed with them, an example of this is assistance for the purchase of a larger car or for bedroom furniture for the child. Having completed its assessment of the child's needs, and, where appropriate the carer's means, the Council is obliged to meet these needs in accordance with its Allowance Policy and failure to comply would result in legal challenge. Again, the fact that once a child to whom the Council owes a duty has been assessed as having a specific need, the Council has a very limited discretion

### 3.9 **Direct Payments**

3.10 Direct payments are monetary payments made to individuals who request such a payment in order to meet some or all of their eligible care and support needs. The total direct payments within Adult Social Care in 2015/16 are currently projected to be £5.624m. The Council has an established monitoring system in place to ensure that direct payments are used for the purposes for which they are made.

3.11 Payments are made following an assessment of a person's need for care and support which concludes that an eligible need exists and a personal budget is determined. They are intended to give users greater choice and control over how their care needs are met. Direct payments have been in use in adult social care since the mid-1990s and for a similar amount of time in children's social care. They remain the Government's preferred mechanism for personalised care and support and are largely seen as a vehicle to encourage greater autonomy, flexibility and innovation in the area of social care.

- 3.12 For adults and their carers the legislative context for direct payments is set out in sections 31 – 33 of the Care Act 2014, section 117(2C) of the Mental Health Act 1983 and the Care and Support (Direct Payments) Regulations 2014. Key features of the statutory framework are as follows –
- 3.9.1 Section 31 of the Care Act 2014 requires the Council to provide a direct payment where one is requested by an adult with capacity and section 32 of the Act requires a direct payment to be made where one is requested by an authorised person on behalf of an individual who lacks capacity. This duty on the Council is subject to some prohibitions contained in schedule 1 of the Care and Support (Direct Payments) Regulations 2014 and these prohibitions relate to situations where an individual suffers from alcohol and drug abuse.
  - 3.9.2 There is a degree of discretion as to the amount of a direct payment. However, the payment must be sufficient to enable the service user (or in the case of disabled children, their family) to purchase services to meet their eligible needs, and must be spent on services that meet eligible needs. This sufficiency is determined by way of the assessment and the setting of the Personal Budget. This is determined based upon professional analysis and consideration of the needs of vulnerable adults and children with disabilities.
  - 3.9.3 There may be circumstances where the Council is permitted to request for a contribution, following a financial assessment, from the individual towards their direct payment. In circumstances where section 117 of the Mental Health Act 1983 applies (after care), no such contribution may be requested, as the Council is not able to charge for any service under that legislative provision.
  - 3.9.4 For disabled children and their carers the legislative context is provided by section 17A of the Children Act 1989 and the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009). Where the child is 16 or 17 and the Direct Payment is being made to a carer of that child the rate of that payment must be made at the rate set out in section 57(4)(a) of the Health and Social Care Act 2001.
  - 3.9.5 When utilising the Direct Payment to employ personal assistants an employment relationship is created meaning that the person receiving the Direct Payment becomes responsible for national insurance contributions and other employer responsibilities.
  - 3.9.6 The Council is able to set out an agreement before a Direct Payment is provided which encompasses how the use of the Direct Payment will be monitored. The Council must be satisfied that the direct payment is being used to meet the care and support needs set out in any individual care plan or the child's needs in their Education, Health and Care Plan and therefore should have systems set out which proportionally monitor their use.
  - 3.9.7 The statutory framework makes provision for recovery of unspent monies. For adult social care the Council is permitted to request to recover unspent direct payments either where a condition attached to it is not met or where the service user dies. For children with

disabilities, regulation 15 of the 2009 Regulations provide for repayment of a Direct Payment, either in whole or in part, where the Council is satisfied it has not been used to secure the provision it is related to or a condition is not met. In both situations, in the event there is an unspent amount following a financial year this must be taken into account as part of a review of payments with the amount for the following year adjusted accordingly and where appropriate.

3.10 The payment of an allowance to meet an eligible social care need is considered to be different in character from a grant. The fundamental difference lies in the Council's obligation to provide the payment. Further, the Council has no choice as to the purpose of the payment, as it must be made to meet the assessed needs. Whilst there may be some discretion as to the amount of the payment, that is itself constrained by reference to what is required to enable the eligible needs to be met and a service user would be entitled to judicially review a decision of the Council which he or she considered to be inadequate for this purpose.

### 3.11 **Free School Meals**

3.12 In September 2013 Tower Hamlets implemented a local scheme to provide free school meals for children in Reception and Year 1 who weren't otherwise eligible to receive a free meal. From September 2014 this local scheme was replaced by the DFE's national UIFSM scheme which was funded by the DFE through specific grant to Schools via the LA, this scheme allowed children in Reception to Year 2 who were not otherwise eligible to be provided with a meal. The Council took a decision to implement free school meals for all pupils in Years 3 to 6 from September 2014 for one academic year and this was extended to include the 2015/16 academic year.

3.13 The money for the local Years 3 to 6 scheme is paid to both maintained and independent schools directly by the Council to reimburse schools for the costs incurred by them to provide free school meals. The budget for the local scheme in 2015/16 is £2.8million and is funded from Public Health Grant. The assumptions and calculations for the distribution of the local scheme reflect the DFE assumptions on take-up for UIFSM, termly payments are made to Schools and a final balancing payment is made in term 3 based on pupil take-up data.

### 3.14 **Pupil Premium Plus**

3.15 Pupil Premium Plus is a Department for Education grant to support and promote the education of children and young people in care. The grant generally provides each looked after child £1,900 to support their education but can be higher depending on an assessment of the child's individual needs. The budget for Pupil Premium Plus for looked after children attending schools in Tower Hamlets in 2015/16 is approximately £155k. Local authorities must allocate the fixed sum provided for each FTE looked after pupil on the January 2015 school census.

- 3.16 The Virtual School for looked after children is the Local Authority lead for ensuring that arrangements are in place to improve the educational experiences and outcomes of the authority's looked after children including those placed out of authority. The Virtual School Head (which was made a statutory role in every Council under the Children and Families Act 2014) is responsible for managing the pupil premium funding for the children they look after and for allocating the funding to schools and non-maintained settings. There is DfE guidance which as to how to manage the funding and distribute the funding.
- 3.17 The Council receives a fixed sum of money from Central Government for each looked after child and merely passes this money onto schools. The Council does not have discretion as to which schools receive the funding as this is determined by the school attended by the looked after child and the Council cannot to decide not to pay. Additionally, where looked after child is placed at a maintained school, this would not be a grant as it would not be a gift outside of the Council's corporate identity. Consequently, these payments are not considered to be grants.

#### **4. COMMENTS OF THE CHIEF FINANCE OFFICER**

- 4.1. This report considers a number of different areas of service delivery and spend within the Children's and Adults Services directorates. The areas considered in this report, namely Carers' Allowances, Direct Payments and the Years 3 to 6 Free Schools meals scheme are all currently monitored and managed within each of the directorates' budgets. There are no additional financial implications as a result of the recommendations in this report.

#### **5. LEGAL COMMENTS**

- 5.1. The power of the Commissioners to make decisions in relation to grants arises from directions made by the Secretary of State on 17 December 2014 pursuant to powers under sections 15(5) and 15(6) of the Local Government Act 1999 (the Directions). Paragraph 4(ii) and Annex B of the Directions together provide that, until 31 March 2017, the Council's functions in relation to grants will be exercised by appointed Commissioners, acting jointly or severally. This is subject to an exception in relation to grants made under section 24 of the Housing Grants, Construction and Regeneration Act 1996, for the purposes of section 23 of that Act (disabled facilities grant).
- 5.2. The wording used by the directions is that the Commissioners will exercise the power "relating to the making of grants under any statutory power or duty". There is no definition of grant given under the directions and therefore, the assumption must be that a grant is that which would be deemed to be a grant under the law.
- 5.3. There is no strict legal definition of grant. However, a grant is in the nature of a gift and is based in trust law. However, grants are often given for a purpose so on the face of it the grant appears to be a payment in respect of the

recipient performing some actions and so it is sometimes unclear whether a grant has been made or the arrangement is a contract for services. A contract for services is not a grant and therefore, an arrangement which is classified as a contract for services would be outside the remit of the power conferred upon the commissioners to approve.

- 5.4. There will be many grants which are made by the Council for the purpose of discharging one of its statutory duties. However, as a grant is in the nature of a gift, it is considered there must be some element of discretion on the part of the Council as grantor as to whom a grant is made to and whether this is made. If the Council is under a legal duty to provide a payment to a specific individual or organisation, and cannot lawfully elect not to make such a payment, then that should not amount to a grant.
- 5.5. It is also clear that for a grant to be properly made it needs to be given to another person or organisation. For the purposes of the Council making grants, this therefore, means that the gift has to be made outside the Council's legal identity for a gift to be made. Therefore, a decision to move money from one department to another should not be deemed to be a grant.
- 5.6. One of the key distinguishing features between a grant and a contract for services is that with a contract for services the recipient of the money has a pecuniary interest beyond that in the receipt of the money itself. This is often in the form of taking a profit from the received money or using the money to have a further money making opportunity.
- 5.7. The relevant statutory frameworks governing each of the payments dealt with in this report are set out in the body of the report above. The conclusions reached as to the correct characterisation of each payment are consistent with the outline principles in paragraphs 5.1 to 5.6 above.
- 5.8. In relation to free school meals, the type of school will be important when considering whether or not such an arrangement is for a grant. Where a school is maintained by the Authority, section 49 of the School Standards and Framework Act 1998 provides that the school acts as the Council's agent when spending the money delegated to it by the Local Authority, and the funds remain the property of the Authority. Largely the effect of this is that the Authority and the School have one legal identity and therefore, this would not be a grant as it would not be a gift outside of the Council's corporate identity. However, independent schools are separate legal entities and therefore the use of the council's discretion to extend its scheme to pupils at those schools amounts to a grant.
- 5.9. In carrying out its functions, the Council must have due regard to the need to eliminate unlawful conduct under the Equality Act 2010, the need to advance equality of opportunity and the need to foster good relations between persons who share a protected characteristic and those who do not (the public sector equality duty). A proportionate level of equality analysis is required to discharge the duty and this is relevantly dealt with in the One Tower Hamlets section of the report.

## **6. ONE TOWER HAMLETS CONSIDERATIONS**

- 6.1. This report considers a number of different areas within the Children's services and Adult Services directorates, there are likely to be no significant impacts to the Equality considerations if the current arrangements for the areas discussed in this report were to continue.

## **7. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT**

- 7.1 The recommendations do not give rise to any relevant implications.

## **8. RISK MANAGEMENT IMPLICATIONS**

- 8.1. The recommendations do not give rise to any relevant implications.

## **9. CRIME AND DISORDER REDUCTION IMPLICATIONS**

- 9.1 The recommendations do not give rise to any relevant implications.

## **10. BEST VALUE IMPLICATIONS**

- 10.1 The Council has a duty to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness by virtue of section 3 of the Local Government Act 1999. This is known as its Best Value Duty.

## **11. Safeguarding Implications**

- 11.1 The recommendations do not give rise to any relevant implications.

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## **Linked Reports, Appendices and Background Documents**

### **Linked Report**

- NONE

### **Appendices**

- Appendix 1 – Guidance on the payment of Allowances
- Appendix 2 – Foster Carers Allowances

### **Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012**

- None