

Provision of Domiciliary care services: treatment of disability related benefits



Law Centre (NI)

At a glance

This briefing examines the legal position governing whether a Health and Social Care Trust's (HSC Trust) may take into account receipt by a service user of disability related benefits when making decisions about the provision of domiciliary care services.

It is aimed at health and social care staff (both managers and practitioners), service users, carers and their advisers.

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- in five areas of law: social security, community care, mental health, employment, trafficking and asylum
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Our advice line

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Introduction

This briefing examines the legal position governing whether a Health and Social Care Trust's (HSC Trust) may take into account receipt by a service user of disability related benefits when making decisions about the provision of domiciliary care services.

The community care legal advisers in Law Centre (NI) have noted an increase in the number of queries raised through the advice line service concerning the issue of whether and, if so, when disability related benefits can be taken into account by a HSC Trust in decisions surrounding the provision of domiciliary care services. It is useful to review and analyse the law and guidance on this issue.

1. Provision of Community Care Services-Treatment of Attendance Allowance, HSS Executive (1999)¹ (the 1999 Directive)

1.1 Background to the 1999 Directive

The 1999 Directive was issued by the former HSS Executive (Child and Community Care Directorate) following representations made by Law Centre (NI) and in view of the potential for judicial review challenges in cases where community care services had been limited solely because service users were in receipt of the higher rate of Attendance Allowance. Concerns had also been raised around the variety of practices existing with respect to the treatment of Attendance Allowance amongst Trusts. It had been reported to the HSS Executive that the practice in certain Trusts was to actively encourage services users in receipt of Attendance Allowance to pay for some domiciliary help privately, on the basis that this was what their benefit was intended to be used for.

Through the 1999 Directive, the HSS Executive sought to clarify the position as to how Attendance Allowance and other disability related benefits should be treated by Trusts when making decisions about the provision of domiciliary care services.

1.2 Position of the HSS Executive set out in the 1999 Directive

The 1999 Directive makes clear that 'receipt of Attendance Allowance or other disability related benefits should not be taken into account in decisions about the provision of community care services'.²

¹ The 1999 Directive is not available online. However, copies can be provided on request from Law Centre (NI)

² The 1999 Directive, paragraph 3

It confirms that 'Chief Executives/Directors of Social Work of community based HSS Trusts should ensure that care managers and other social care staff who have responsibility for allocating and managing community care services are aware of this decision'.³

Managers and practitioners are directed to 'review their case loads and identify those clients who may have been disadvantaged by such practices. Where clients have been disadvantaged in this way, steps should now be taken to ensure that the appropriate level of care and support is given in accordance with assessed need and local priorities'.⁴

It concludes by stating that 'policies and practice guidance should be revised to correct any misunderstanding that may persist about entitlement to benefit and the provision of community care services'.⁵

2. Provision of residential and nursing home accommodation: treatment of disability related benefits

Although not explicit in the 1999 Directive, it is assumed that the directions given by the HSS Executive concerning treatment of Attendance Allowance and other disability related benefits will only apply to community care services provided outside of a nursing home or residential care home setting. Where a service user is placed in residential or nursing home care by a HSC Trust, a distinct charging regime applies which is founded on rules set out in the Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993 (as amended).⁶

3. Continued applicability of the 1999 Directive

The continued applicability of the 1999 Directive was most recently considered by the Northern Ireland High Court in the case of 'In the matter of an Application by Kathleen McClean for Judicial Review [2011]'⁷ (McClean's Application).

³ Ibid, at paragraph 4

⁴ Ibid

⁵ Ibid

⁶ For more information on the legal rules governing financing residential care, see Law Centre (NI) Encyclopaedia of Rights 'Financing Residential Care' available at <http://www.lawcentreni.org/EoR/community-care/financing-residential-care.html#Introduction>

⁷ [2011] NIQB 19, available at http://www.courtsni.gov.uk/en-gb/judicial%20decisions/publishedbyyear/documents/2011/2011%20niqb%2019/j_j_mccle8085final.htm

McClean's Application concerned the alleged failure of the Western HSC Trust to provide adequate domiciliary care services to a service user with physical health issues.⁸

One element of McClean's Application required the NI High Court to consider whether Mrs McClean's disability related benefits had been taken into consideration by the Trust in contravention of the requirements of the 1999 Directive.

Clarification was sought from the Department of Health, Social Services and Public Safety (DHSSPSNI) as to whether the 1999 Directive was still in force.

During the hearing of McClean's Application, DHSSPSNI confirmed that the 1999 Directive was still in force, neither amended nor superseded.

Since the decision in McClean's Application, it appears to be the case that no new guidance has been issued by DHSSPSNI to rebut the provisions of the 1999 Directive and it remains in force.

4. Decision in McClean's application

In McClean's Application, the NI High Court interpreted the practical implications of the 1999 Directive for HSC staff. The Court confirmed its view that 'It is common case that if the Trust, in its assessment and reassessment of Mrs McClean's eligible needs under the Circular⁹, took into account her disability related benefits it was acting in contravention of the prohibition enshrined in the 1999 directive.¹⁰

5. Conclusion

Following the decision in McClean's Application and in the absence of any further guidance from DHSSPSNI, the requirements set out in The 1999 Directive must continue to be upheld by HSC staff. In this regard, HSC care managers and social work staff must ensure that domiciliary care services should not be denied to individuals with assessed eligible needs on the basis that they are in receipt of disability related benefits. Most importantly, service

⁸ For more information on this case see Law Centre (NI) Information Briefing (31) entitled 'Assessing eligibility for domiciliary care services: McClean's Application' available at <http://www.lawcentreni.org/Publications/Law-Centre-Information-Briefings/Community%20care%20briefings/Briefing-31-Domiciliary-Care-Eligibility.pdf>

⁹ Regional Access Criteria For Domiciliary Care, DHSSPSNI (2008), available at https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/circular-eccu-2-2008-domicillary-care-access-criteria_0_1.pdf

¹⁰ [2011] NIQB 19, paragraph 37

users should not be directed to use their disability related benefits to fund private care services on the basis that this is what their benefit is to be used for.

Independent Advice, Support and Mediation Service (Community Care)

The Law Centre's Independent Advice, Support and Mediation Service (Community Care) runs a specialist advice line and representation service.

How we can help you

We provide advice and assistance to:

- adults who have needs due to physical or mental disability, ill health or age,
- adults with sensory disabilities, and
- adults whose needs arise because of their role as carer.

We can help in cases which raise issues concerning the legal responsibilities of health and social care trusts and other public bodies in the provision of health and social care.

We also welcome calls from health and social care staff, other healthcare providers and advisers.

Our advice line: 028 9024 4401, Monday to Friday, 9am to 1pm and 2pm to 5pm, out of hours voicemail service available

We also run a regional advice clinic service, please contact us for further information.

We advise in all areas of community care, including:

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- benefits and community care
- grants for home improvements for people with disabilities
- services for young adults transitioning from Children's Services
- financing residential and nursing home care
- carer's assessments
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Representation service - We resolve the majority of cases through negotiation with HSC Trusts and service providers.

Where necessary, we initiate judicial review proceedings in the High Court to clarify interpretation of health and social services law and/ or to challenge decisions made by public bodies or HSC Trusts. We can pursue appeals to the Court of Appeal and beyond where necessary.

Training - We provide training for health and social care staff and for advisers working in the field of community care. For more information on courses available, visit: www.lawcentreni.org/training/training.html

More information

Consult our website for more information on the service and on health and social care legal issues: www.lawcentreni.org

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