Cerebra Legal Entitlements Research Project

Digest of Opinions

Summer/Autumn 2013

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CEREBRA LEGAL ENTITLEMENTS RESEARCH PROJECT AT CARDIFF LAW SCHOOL

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In 2013 an innovative research programme commenced at Cardiff Law School with funding and technical support from Cerebra, a unique charity set up to help improve the lives of children with neurological conditions.

The research programme is founded on the work of Cardiff Law School's pioneering Law Clinic. The Clinic is run by volunteer undergraduate and postgraduate students, assisted by practising solicitors, barristers and the Law School's own academic staff. The Clinic provides legal advice on a diverse range of issues and comprises a number of specialist schemes. The Cerebra Legal Entitlements Research Project is one of these schemes and provides support for disabled children, their families and advisers, who are encountering difficulties with the statutory agencies in relation to the provision of health care, social care and education.

This Digest is a selection of the Opinions produced by the Project in 2013. All the young people's names have been fictionalised. The opinions were prepared during the summer and autumn of 2013 and are a statement of the law and policy at that time. It should be remembered that the law does change – although the obligation on public bodies to act reasonably does not.

Without the funding and technical support provided by Cerebra, the Project could not have been developed.

Its practical success owes much to the many Cerebra colleagues who have helped us overcome teething problems; have managed the referrals; and throughout been wonderfully positive and imaginative.

We are immensely grateful to the student advisers for their freely given support and dedication. Very special thanks are also due to:

- The Project's Advisory Group that has played a key role in focussing, supporting and acting as a sounding board for the research programme; and
- The outside legal professionals who have provided support for the Project – and during 2013 particular thanks are due to Irwin Mitchell solicitors and NewLaw solicitors.

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For further information on the programme see www.law.cf.ac.uk/probono/cerebra.html

For access to the programme see www.cerebra.org.uk/english/gethelp/legalhelp/pages/default.aspx

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RON'S STORY

Main topics: *Direct Payments*
Definition of disability

Ron, aged seven, has learning disabilities and a statement of Special Educational Needs. Occasionally aggressive, his behaviour can be difficult to manage. Following an assessment, respite care for his parents was recommended. Their subsequent request for Direct Payments to meet this identified need was refused by the local authority who claimed Ron had not been formally diagnosed as disabled. His parents had not been informed of their right to be assessed as carers, nor had any such assessment taken place for Ron's siblings.

Recommendations: *LA apologise for maladministration.*
Compensation be sought for delay in service provision.
Confirmation that respite care now be met via Direct Payments.

Relevant Law: *Children Act 1989 s 17 (11).*
Chronically Sick and Disabled Persons Act 1970 s 2.
Mental Health Act 1983 s 1(2).
Equality Act 2010 s 6(1).
Carers (Recognition and Services) Act 1995 s 1(2)& s 1(2B).
European Convention on Human Rights, Article 8.
Human Rights Act 1998.

*Note: this is an **English** case.
The law in Wales is, however, almost identical

Summary of Facts

This Advice concerns Ron, a 7 year old boy who (as evidenced by his Paediatrician in his Statement of Special Education Needs (SEN)) has been diagnosed as having a moderate learning disability which is referred to as 'Global Development Delay' (GDD). Ron qualifies for and receives Medium Rate Disability Living Allowance (DLA).

Ron's condition manifests itself in a number of ways and presents particular difficulties with behaviour management and aggressive episodes which can have an adverse impact on his siblings and the wider family unit. As Ron grows in strength, his parents are finding it increasingly difficult to carry out day-to-day tasks such as dressing and bathing him.

Recommendations from a number of health care professionals have been made, detailing the immediate need for respite care and support for the family. Section 17 Children Act 1989 necessitates that local authorities must carry out an assessment of every 'child in need'. Such an assessment was carried out for Ron by a local authority social worker on 22nd May 2013 which detailed the need for respite care. Ron's parents have asked that this eligible need be met by the provision of Direct Payments, but we are instructed that this request has been declined by the local authority on the basis that Ron is not eligible because he has not been formally diagnosed with a 'disability'.

We are instructed that neither of Ron's parents have received a carer's assessment, nor have they been offered one to date. There has also been no mention of the possibility of assessing Ron's siblings in respect of the impact that the caring responsibilities have on the wider family unit.

Relevant Legal issues

The following issues are considered in this advice:

- Whether Ron is a 'disabled child' for the purposes of the Children Act 1989;
- Whether Ron's eligible needs create an entitlement to the provision of Direct Payments to enable his parents to purchase care and support services to meet his eligible needs;
- Whether it is lawful for a local authority to deny direct payments for a child such as Ron on the basis that he has not formally been diagnosed as having a 'disability'.
- Should Ron's parents and/or his siblings be offered a carer's assessment?

Relevant Law and Guidance

Disability: the definition

For the purposes of the Children Act s17 (11) (and in consequence the Chronically Sick and Disabled Persons Act 1970, s2) a child is a 'disabled child' if s/he (amongst other things) suffers from a 'mental disorder of any kind'. Section 1(2) of the Mental Health Act 1983 defines a 'mental disorder' as 'any disorder or disability of mind'.

The Equality Act 2010, section 6

Section 6 (1) provides that a person has a disability if a) s/he has a physical or mental impairment and b) the impairment has a substantial and long term adverse effect on the person's ability to carry out normal day-to-day activities.

The duty of Local Authorities to support disabled children and their families

Local authorities are under a duty to undertake an assessment of the needs of disabled children for support services under (amongst other provisions) the Children Act 1989 Part III and the Chronically Sick and Disabled Persons Act 1970, s2 (see for example *R v. Barnet ex p G* (2003).[1]

The duty of Local Authorities to undertake Carers' Assessments

Where a local authority assesses the needs of a disabled child under the Children Act 1989 and/or the Chronically Sick and Disabled Persons Act 1970, it is under a duty to offer his / her carers (if providing regular and substantial care) a carer's assessment by virtue of the Carers (Recognition and Services) Act 1995 sections 1(2) and 1(2B) and section 6 Carers & Disabled Children Act 2000 (and see also *R (LH and MH) v Lambeth LBC* (2006)[2]). The purpose of a carer's assessment is to assess the sustainability of the caring relationship.[3] The guidance provides that measures should be taken to prevent isolation of carers, specifically to allow them to return to work where this is desired[4]. The Carers (Equal Opportunities) Act 2004 requires that local authorities take into account the carer's aspirations (including work, training, education, leisure needs) and other responsibilities / pressures of daily life.

European Convention on Human Rights / Human Rights Act 1998)

Article 8 of the European Convention on Human Rights places a positive obligation on local authorities to provide support for families with disabilities (see for example *Kutzner v. Germany* (2002)[5] and *Botta v. Italy* (1998)[6]). In assessing the extent of this obligation it is relevant to have regard to the UK's obligations under: (1) the UN Convention on the Rights of the Child, not least the obligation under Article 23 to provide a range of support services to meet the needs of disabled children – which includes the provision of the special care and assistance that they and their parents (and other carers) are entitled to under the Convention;[7] and (2) the UN Convention on the Rights of Persons with Disabilities – and in particular Article 19 which requires (amongst other things) the provision of a 'range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community and to prevent isolation or segregation from the community' (see for example *Burnip v. Birmingham City Council* and *Gorry v. Wiltshire County Council* [2012] EWCA Civ 629, at para 20).

Analysis: Application of the Law to the Facts

Ron's paediatrician's diagnosis, his Statement of SEN, together with his receipt of DLA, creates (at the very least) a presumption that he is a disabled child for the purposes of Part III Children Act 1989 and the Chronically Sick and Disabled Persons Act 1970, s2. The evidence would also suggest that Ron's condition constitutes a 'disability' for the purposes of the Equality Act 2010, s6, having as it appears to have, a 'substantial and long term adverse impact on his ability to carry out normal day-to-day activities'.

On this basis it would appear unreasonable for a local authority to delay its provision of care and support by insisting that he first undergo a further medical examination to establish whether he is a disabled child. This requirement is all the more troubling given the council's public adoption of the 'Social Model of Disability'[8] and its rejection of the Medical Model – which in the present case it appears to be propounding by insisting on a medical diagnosis. At the very least, the local authority is under a public law obligation to provide cogent reasons as to why it doubts that Ron is a disabled child. We have seen no evidence that such reasons have been provided.

[1] [2003] UKHL 57 [2003] 3 WLR 1194

[2] [2006] EWHC 1190 (Admin) 25 May 2006

[3] *Department of Health, Carers and Disabled Children Act 2000: carers and people with parental responsibility for disabled children: practice guidance*, 2001, para 60; in Wales as National Assembly (NAW) (2001) *Guidance 2000 Act* and NAW (2000) *Practitioners' Guide to Carers Assessments*.

[4] Department of Health, *Carers and Disabled Children Act 2000: carers and people with parental responsibility for disabled children: practice guidance*, 2001, para 35

[5] 46544/99; 26 February 2002: see also *Moser v. Austria* Application no. 12643/02 21 September 2006; and *Saviny v. Ukraine* Application no. 39948/06 18 December 2008 and *cf H and others v Norway* 75531/01, an inadmissibility decision of the 21st October 2004 which concerned parents with mental health problems.

[6] 153/1996/772/973 24 February 1998; 26 E.H.R.R. 241 – and see also *Glor v. Switzerland* (2009), considered under article 14 below.

[7] Committee on the Rights of the Child General Comment No. 9, The rights of children with disabilities (Forty-third session, 2007) para 13.

[8] Local authority Equality and Diversity Policy accessed 21st October 2013 which notes 'the Council's commitment to promoting equality of opportunity between disabled people and other people by adopting the Social Model of Disability.'

Ron's need for support services was assessed on 22nd May 2013 and this assessment identified an eligible need for respite care. Once a need has been assessed as an eligible need, the local authority is under a duty to provide such services and (where the disabled child's parents so elect) to meet that need by the provision of direct payments (see s17A Children Act 1989 and the relevant regulations[9]).

We are instructed that neither of Ron's parents have been informed of their right to a carer's assessment, nor have they been offered or provided with such an assessment. There has also been no mention of the possibility of assessing Ron's siblings in respect of the impact that the caring responsibilities have on the wider family unit. For the reasons outlined above, this failure would appear to constitute a breach of the local authority's statutory duties and public law obligations to Ron and his family.

Preliminary Conclusions

1. The evidence suggests that:
a. Ron is a disabled child for the purposes of the relevant legislation; and
b. Ron has been assessed as being in need of respite care;
2. Once a need of this nature has been assessed as an eligible need, then an enforceable duty on the local authority to provide, commission or to facilitate this support crystalises;
3. In such a situation, there is a prima facie right for the parents to opt to have the support by way of a direct payment.
4. Ron's parents (and arguably his siblings) should be offered a carer's assessment.

Remedy

The Local Government Ombudsman has issued detailed information and practice guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[10] The guidance notes that an appropriate remedy may require a number of separate elements, including recommendations as to specific action that should be taken and as to an apology. As a general principle, the remedy needs to be 'appropriate and proportionate to the injustice; it should, as far as possible, put the complainant in the position he or she would have been in but for the maladministration'. Where 'this cannot be achieved because of the passage of time or of events which have occurred ... financial compensation may be the only available approach'.[11]

It would appear to follow that:

1. As a result of the local authority's fault and delay Ron and his family have been caused considerable distress, anxiety and inconvenience for which the ombudsman's guidance would suggest that a formal apology and a payment should be made in recognition of this injustice – not least to compensate them for the significant unnecessary time and trouble they have been put to in pursuing matters with the Council.

2. The Council should, within 10 working days of receiving this advice, confirm in writing that it will meet the assessed need for respite care, by way of a direct payment – which should be processed and paid to Ron's parents without delay (for example, within a further 10 working days).

3. The local authority's failure has resulted in Ron being denied respite care. A compensatory payment should be made to reflect the cost of the services that he should have received from the 22nd May 2013 until the date that a direct payment is made to the family: a failure to make such a payment would mean that the council was – in effect – profiting from its maladministration.

[9] The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887 and the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 SI No 831 (W125); see also Regulation 3 of the Breaks for Carers of Disabled Children Regulations 2011. Also see Public Service Ombudsman (Wales) Complaint No B2004/0707/S370 against Swansea City Council, 22 February 2007 – see in particular paras 78, 133 and 137.

[10] LGO (2005) *Guidance on good practice 6: remedies*.

[11] LGO guidance p3.

ALICE'S STORY

Main topics: *Refusal to provide carer's assessment*
Delay in providing legal entitlement
Child and Adolescent Mental Health Services (CAMHS)

Alice's undiagnosed Asperger's syndrome resulted in mental health problems and subsequent admission to a CAMHS unit. In response to her parents' request for a carer's assessment, the local authority sought to delay the process for several months, by which time they would be in a "better position" to respond.

Recommendations: *Alice is a "child in need"*
Her parents are legally entitled to carers' assessments
The LA has a legal duty to provide this service without delay
Refusal to do so, or delay, constitutes maladministration
LA should conduct carers' assessments within15 days

Relevant Law: *Children Act (1989) s 17 (1)*
Carers Act (1995) s 1(2)
Carers and Disabled Children Act (2000) s 6
Carers (Equal Opportunities) Act (2004)

*Note: this is a **Welsh** case.
The law in England is, however, almost identical

Summary of Facts

The case concerns parents of a child Alice whose Asperger's syndrome went undiagnosed. As a consequence, she experienced mental health problems which resulted in her being admitted to a CAMHS unit for a four-month inpatient stay.

Alice's parents have sought a carer's assessment. Following their request the relevant local authority responded by letter dated 19 August 2013 stating: "this is not a service we are able to provide at this moment in time. Please re-contact the contact centre from early October onwards when we anticipate that we are in a better position to provide the assessment you have requested".

Relevant Law and Guidance

Statutory Principles
The Children Act 1989
Section 17(1) of the Children Act 1989 requires a local authority to provide services which are necessary to promote the welfare of children in need and the upbringing of such children by their families. Local authorities are subject to a duty to assess the needs of such children.[12] Section 17(10)(c) of the 1989 Act defines a 'child in need' as including a disabled child and a disabled child is defined by s17(11) as including a child who "suffers from a mental disorder of any kind".

1995 and 2000 Carers Acts
By virtue of section 1(2) of the Carers (Recognition and Services) Act 1995, a carer is entitled to request an assessment of his/her ability to provide care for a disabled child where the local authority has assessed the needs of a disabled child under the Children Act 1989 or s2 of the Chronically Sick and Disabled Persons Act 1970 and where the carer provides or intends to provide a substantial amount of care on a regular basis for the disabled child. Where a carer makes such a request, the local authority must carry out an assessment. This duty is reinforced by section 6 of the Carers and Disabled Children Act 2000.

Section 1(2) of the 1995 Act and section 6 of the 2000 Act prescribe that the duty to conduct a carer's assessment arises when the assessment is requested.

The Carers (Equal Opportunities) Act 2004 imposes a statutory duty on local authorities to inform carers of their right to an assessment and to ensure that a carer's assessment considers whether the carer works or wishes to work and/or is undertaking, or wishes to undertake, education, training or any leisure activity.

Guidance Issued Under the 1995 and 2000 Acts
defining 'substantial' and 'regular'
These words are not defined in the 1995 and 2000 Acts. Guidance on the meaning of the word 'substantial' advises that it should be widely interpreted in a way

[12] *R v. Barnet ex p* G [2003] UKHL 57, [2003] 3 WLR 1194 and see Schedule 2, Part 1(3) of the 1989 Act.
[13] LAC (93)10 appendix 4 para 8 in England and WOC 35/93 appendix 4 para 8 in Wales.

which takes 'full account of individual circumstances'.[13] The guidance also suggests that 'substantial' has both a subjective and objective element and is primarily concerned with the impact that the caring role has on the individual carer.[14]

The practice guidance to the 1995 Act indicates that 'regular' does not require a uniform pattern of care, but rather indicates an ongoing caring responsibility.[15]

Case Law and Public Law Principles

The Statutory duty on Local Authorities to provide a Carer's Assessment

In *HN (A Minor)* (2010)[16] the High Court held that there was an 'unconditional statutory obligation' to carry out a carer's assessment of a parent carer when requested so to do, within a reasonable period of time. This case concerned Article 18A of the Children (Northern Ireland) Order 1995 which in material terms appears indistinguishable from s1(2) Carers (Recognition and Services) Act 1995.

In *R (LH and MH) v Lambeth LBC* (2006)[17] a social services assessment of a 19 year old disabled child accepted that his behaviour was having an adverse effect on his mother's health but the care plan then failed to explain how her needs would be addressed. The court declared that the local authority was in breach of its assessment obligations under the Children Act 1989 (in relation to the child) and under the Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000 (in relation to the mother).

The Ombudsmen have made similar findings. In 2006, the Public Service Ombudsman found maladministration where a local authority had failed to undertake a separate assessment for the carer of a disabled child[18] and in 2009 the Local Government Ombudsman[19] came to the same conclusion in a case where a child's autism was particularly challenging and was putting significant strain on both the parents and his younger sister.

Timescale for Providing a Carer's Assessment

Where a statutory provision provides no timescale for the discharge of a duty (as is the case with the obligation to complete a carer's assessment) the courts require that it should be done 'within a reasonable period'.[20] In relation to a community care assessment, the Local Government Ombudsman 'normally considers that it is reasonable for this to take between four and six weeks from the date of the initial request'.[21] Given that a carer's assessment is generally undertaken as part of this process (and that the outcome of this assessment is to be taken into account when deciding what community care services are provided) it must follow that as a general rule a carer's assessment must also be undertaken within the four to six week period.

Analysis: Application of the Law to the Facts

Given that Alice has a diagnosis of Asperger's syndrome, she falls under the definition of a disabled child in section 17 of the Children Act, and is therefore a child in need.

Given the substantial care that Alice's parents are providing on a regular basis, it follows that they are each entitled to a carer's assessment under the 1995 and 2000 Acts.

As the duty on a local authority to provide a carer's assessment arises as soon as the assessment is requested, the onus is on the local authority to carry out the carers' assessments of Alice's parents within a reasonable timescale, and arguably within 4-6 weeks of the assessment/s being requested.

For a local authority to refuse to provide an assessment ("this is not a service we are able to provide at this moment in time") and to suggest that the parent applies again two months later, would appear to be a direct breach of public and statute law and, it follows, maladministration.

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[14] Department of Health, *Carers and Disabled Children Act 2000 carers and people with parental responsibility for disabled children: practice guidance*, 2001, paras 67-8; and National Assembly (NAW) (2001) Guidance 2000 Act para 4.11.

[15] LAC (96)7 para 7 (in England); WOC 16/96 and WHC (96)21 (in Wales)

[16] NIHC/QB/2010/86.

[17] (2006) EWHC 1190 (Admin) 25 May 2006.

[18] Public Service Ombudsman (Wales) Complaint No. B2004/0707/5/370 against Swansea City Council: the council had suggested undertaking a carer's assessment was merely a 'goodwill gesture'.

[19] Complaint No 07B 04696 and 07B 10996 against LB Croydon 16th September 2009, and see also Local Government Ombudsman's Digest of Cases (Education) 2008/09 Report 06B04654.

[20] See eg *Re North ex p Hasluck* [1895] 2 QB 264; *Charnock v Liverpool Corporation* [1968] 3 All ER 473.

[21] Local Government Ombudsman (2011) Fact Sheet 54 'Complaints about councils that conduct community care assessments' at http://www.lgo.org.uk/publications/fact-sheets/complaints-about-community -care-assessments/

Preliminary Conclusions

On the basis of the above analysis and the papers we have been provided, our preliminary opinion is that:

1. The local authority has an enforceable duty to undertake a carer's assessment where a parent has significant caring duties in relation to a disabled child, and that this duty arises when the carer's assessment is requested;
2. Once this duty has arisen it is unlawful for the local authority to fail to conduct such an assessment within a reasonable timeframe;
3. It is unlawful for the local authority to advise carers that an assessment cannot be carried out, but might be at some future time.

Given the above analysis, it follows that:

1. The local authority should make expedited arrangements:
(a) to confirm (eg within 3 working days) that it will undertake a carer's assessment of Alice's parents; and
(b) to complete these assessments within a short period (eg within 15 working days);
2. The family is due an apology for the delay and the maladministration that has characterised the local authority's approach to this issue in the past.

HARRY'S STORY

Main topics: *Refusal by local authority to provide school transport*
Public authority applying a "blanket" policy

Harry, who is 10, has severe learning difficulties and Down's syndrome. The LA expected Harry to walk to the school named in his SEN statement, using a dark, single-track route, busy with traffic but without pavements. The LA adhered to a strict policy, only providing transport for children living three miles or more from their school. There appeared to be no adjustment to this policy for disabled children.

Recommendations: *The designated route is unsafe for Harry to walk*
Harry is a "child in need"
The LA thus fails in its statutory duty
A LA should exercise discretion with its policies
The LA has failed to make "reasonable adjustments"
The LA should provide school transport for Harry

Relevant Law: *Education and Inspections Act (2006) s508B &35B*
Children Act (1989) s 17 (1)(a)(b)
Equality Act (2010). S19,20,149

Also: *Road Safety Great Britain: Walked routes to school (2012)*

*Note. This is an **English** case.
The law in Wales is similar – see Neville's case below.

Summary of Facts

The case concerns Harry , a 10 year old boy with Down's Syndrome and severe learning difficulties. Harry has a Statement of Special Education Needs (SEN) and attends a school that is named in the Statement.

Harry lives with his parents in a rural area 1.8 miles from his school. The route prescribed by the council to this school involves walking through lanes which in some sections are single track with no passing places or laybys, lack street lighting, formal pavements, and have a surface in poor condition with many potholes. In walking the route, Harry would have to cope with high volume traffic at peak times which would coincide with times when lighting is poor (early morning rush hour in winter).

Harry's parents believe that it is unsafe / impracticable for Harry to walk the proposed route alone or indeed accompanied and have provided detailed evidence to this effect, that identifies the following factors:

- The specific expression of Harry's disability makes him prone to running off, becoming easily distracted (especially by holes), and becoming distressed by loud noises;
- The proposed route would make it very difficult for a responsible adult to maintain effective control over Harry and impossible for him to walk alone as a result of his disability.

Harry's parents have in addition provided cogent reasons as to why they are unable to accompany their son to school (in summary, that they have another child attending a different school in the opposite direction and taking both children at the same time would cause considerable distress to Harry due to his past association with the other school).

The local authority in whose area Harry lives adheres (it appears strictly) to a policy that "all children who live under 3 miles away from their school will not be eligible for funded travel by the local authority". Harry's parents have not been informed by the authority that this policy is adjusted in the case of disabled children. Notwithstanding this approach by the authority, Harry's parents applied for travel assistance to enable him to reach his school safely and this was refused, as was an appeal against the preliminary decision.

The reasons given for the refusal decision were:
(1) that Harry could be "helped" to understand his past association with his previous school so that it would not cause him distress when his sibling and he were taken to school in the same journey; and
(2) that it was reasonable to expect parents to make arrangements to ensure that Harry and his sibling were able to attend school.

Relevant Law and Guidance

Education

The principal provisions that govern local authority responsibility for making suitable school and travel arrangements for children are contained in Part 6 of the Education and Inspections Act 2006. Section 444(5) of the Act prescribes the statutory walking distance as two miles for children aged under eight, and three miles for children aged eight and over.

Section 508B of the 2006 Act[22] places a duty on local authorities to put in place for eligible children suitable travel arrangements to facilitate their attendance at school.[23] Section 35B defines an eligible child as being one (having regard to the child's disability) who cannot reasonably be expected to walk to school.

Central Government Education Guidance

The Department for Education and Skills Home to School Travel and Transport Guidance 2007 states that "the measurement of the 'statutory walking distance' is not necessarily the shortest distance by road. It is measured by the shortest route along which a child, accompanied as necessary, may walk with reasonable safety.[24]"

Local Education Guidance

Our research reveals that the local authority in which Harry resides has a Home to School Transport Entitlement Policy. In this policy the statutory distance is outlined (in accordance with the Education and Inspections Act 2006)[25]. In the Home to School Transport Entitlement Policy the Council acknowledges the requirement that the route be safe for the child to walk[26]. When there is concern about the safety of the walking route the policy provides for an appeal[27].

Road Safety Great Britain has published an 'Assessment of Walked Routes to School' in which it states that if the route does not allow for the child to walk in reasonable safety, then it should be designated as an "unacceptable" route by the Road Safety Officers[28]. In the event that the walking route is deemed unacceptable the Council would be under a duty to provide free transport regardless of the distance.[29]

[22] Section 508B(1) states "A local education authority in England must make, in the case of an eligible child in the authority's area to whom subsection (2) applies, such travel arrangements as they consider necessary in order to secure that suitable home to school travel arrangements, for the purpose of facilitating the child's attendance at the relevant educational establishment in relation to him, are made and provided free of charge in relation to the child."

[23] Department for Education and Skills: Home to School Travel and Transport Guidance [2007]

[24] Department for Education and Skills Home to School Travel and Transport Guidance, Part 2 Section 47 [2007]

[25] [named] Council Home to School Transport Policy [2012/2013]

[26] Ibid Section 2.7 and Section 4

[27] Section 4.2 states "Factors to be taken into consideration include the age of the child, the width of the roads, the existence of pavements, visibility, the speed and volume of traffic, the existence or otherwise of lighting and the condition of the route at different times of the year"

[28] Road Safety Great Britain Children and Adult Services Appeals Committee: Assessment of walked routes to school, first published in 2002 and fully updated in 2012.

[29] Education and Inspections Act 2006 Schedule 8 Section 4 - When the routes are deemed unacceptable the child is then encompassed within the meaning of "eligible child" and the provision of transport is then mandated by Section 77 of the Act.

Statutory Provisions: Social Care

Section 17 of the Children Act 1989[30] places a duty on local authorities to provide services which will (amongst other things) minimise the effect of disabilities on disabled children.[31]

Guidance on the 1989 Act is found in the Framework for the Assessment of Children in Need and their Families (2000). The guidance recognises the right of parents to expect practical support from education and healthcare services to aid them in supporting their child[32] to overcome potential disadvantage. To meet this aim the Local Authority must work collaboratively with other support mechanisms[33] to ensure that the child receives the support necessary to be able to achieve optimum success in adulthood.[34]

Statutory Provisions: Equality / Non-discrimination

Indirect discrimination

Section 19 of the Equality Act 2010[35] makes unlawful discrimination that arises (amongst other ways) when a policy puts a disabled child at a particular disadvantage when compared to children who do not have a similar impairment, and the policy cannot be shown 'to be a proportionate means of achieving a legitimate aim.'[36]

Duty to make reasonable adjustments

Section 20 of the Equality Act 2010 places a duty on (amongst others) local authorities to make reasonable adjustments for disabled persons in the services they provide. This includes providing transport for children to school.[37]

Public sector equality duty

Section 149 of the Equality Act 2010 places a duty on local authorities to promote equality for (amongst others) disabled people and to eliminate discrimination. The Government Equalities Office has published a guide to assist public authorities to comply with their public sector duty under the Equality Act 2010[38]. The above cited 'Home to School Travel and Transport Guidance' stresses the importance of local authorities having regard to their equality obligations – a point emphasised by the Local Government Ombudsman in a 2010 report which concerned difficulties not dissimilar to those identified by Harry's parents. In his report[39] the Ombudsman noted that he "would have expected to see explicit consideration given to whether the provision of school transport was a reasonable adjustment to meet needs. In the absence of such evidence I cannot conclude this issue has been properly considered".

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[30] Section 17(1) provides that "It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
(a) to safeguard and promote the welfare of children within their area who are in need; and
(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs."

[31] Part 1 Schedule 2 of the Children Act 1989

[32] Framework for the Assessment of Children in Need and their Families 2000 section1.3

[33] Ibid , section 1.12 states that "The Children Act 1989 places a specific duty on agencies to co-operate in the interests of children in need in section 27. Section 322 of the Education Act 1996 also places a duty on the local authority to assist the local education authority where any child who has special educational need"

[34] Ibid 1.17

[35] Section 19 provides that:
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

[36] See for example, G v St Gregory's Catholic Science College [2011] EWHC 1452 (Admin). Although in this case the school had failed to undertake an equality impact assessment (see below) concerning the policy, this was not considered by the court to be conclusive – although material – as to whether the policy could be justified.

[37] Section 20(3) applies where "… where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

[38] Public sector: quick start guide to the public sector Equality Duty [June 2011]

[39] Local Government Ombudsman Report on an investigation into complaint no 09 010 645 against Surrey County Council 8 September 2010 para 40.

Principles of public law - Fettering of discretion

Where a public authority is required to perform a duty, it cannot apply 'blanket' policies which do not allow for exceptions. In R v Eastleigh BC ex p Betts,[40] it was held that a public body is entitled to develop and follow a general policy as to how it provides a particular service. However, the principle that a public body must be prepared to consider individual cases on their particular merits is well established in law in England and Wales and has been upheld in numerous cases, including analogous cases related to social care.[41]

In R v Bexley LBC ex p Jones it was held that:

> *"It is … legitimate for a statutory body … to adopt a policy designed to ensure a rational and consistent approach to the exercise of a statutory discretion in particular types of case. But it can only do so provided that the policy fairly admits of exceptions to it."*[42]

The requirement to consider relevant matters

A public body is required to act reasonably in the discharge of its functions.[43] Following the principles laid out in *Associated Provincial Picture Houses v Wednesbury Corporation* (1948), in making any decision, a public body is required to take account of all the relevant considerations.[44]

Analysis: Application of the Law to the Facts

The reasonability of the Local Authority requiring Harry to walk the prescribed route to and from school

The evidence provided would appear suggest that, prima facie, the designated route Harry has to walk to school would be unsafe and distressing for him, as a result of his disability. Given the evidence, there would appear to be an onus on the local authority to carefully consider the issue of the impact of Harry's disability on his ability to walk to school safely. The fact that transport has been denied suggests that this has not been done. In failing to acknowledge Harry's disability, it is arguable that the local authority has failed to comply with its statutory duty and has failed to fairly apply its own policy.

Principles of public law - Fettering of discretion

It would appear that the local authority is attempting to apply a blanket policy to all cases, with the consequence that no child living less than 3 miles away from their school could ever receive free transport. This is prima facie unlawful. The local authority should be looking at Harry as an individual and should be prepared to exercise its discretion based on his particular circumstances.

Whether the Local Authority is acting in compliance with the Equality Act 2010

Indirect Discrimination

Harry's local authority adheres to the policy that *"all children who live under 3 miles away from their school will not be eligible for funded travel by the local authority."* We have not been made aware of any evidence (in terms of local guidance or Harry's individual case) that this policy has been applied with flexibility. A rigid application of the policy would place some disabled children (such as Harry) at a disadvantage when compared to children who are not disabled. In the absence of evidence to the contrary there would to appear to be a prima facie case that the application of the local authority's Home to School Transport Entitlement Policy to disabled children, including Harry, is contrary to s.19 of the Equality Act 2010.

Failure to make reasonable adjustments

The 'reasonable adjustment' duty under s.20 of the 2010 Act reinforces the general duty under s.19 by creating a specific obligation to consider making actual adjustments to a policy in individual cases. As with the s.19 duty, we have seen no evidence that, in the present case, this obligation has been considered by the local authority to assess what reasonable steps it should take to avoid the disadvantage. Again, in the absence of such evidence there would to appear to be a *prima facie* case that the authority has failed to address properly its s.20 obligations under the 2010 Act.

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[40] [1983] 2 AC 613, HL

[41] Multiple cases, including: *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, [1970] 3 All ER 165, HL R v Warwickshire County Council ex p Collymore [1995] ELR 217, In re Findlay [1985] 1 AC 316, R v Ealing LBC ex p Leaman (1984) Times 10 February.

[42] [1995] ELR 42 p55

[43] Clements and Thompson, 2011. Community Care and the Law 5th edition. London: Legal Action Group paras [26.163 – 26.164].

[44] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

Preliminary Conclusions

The Cerebra Pro Bono Team's preliminary conclusions are therefore that:

1. The local authority has acted unreasonably in requiring Harry to walk the prescribed route to and from school and has failed to consider the compounding impact of his disability.
2. The local authority is not acting in compliance with its obligations towards disabled children under the Equality Act 2010.
3. The local authority is fettering its discretion by seeking to apply a blanket policy and not considering the impact of Harry's disability on his ability to walk to school.

Given the failures in law as outlined in this preliminary opinion, it may be that the council would be prepared to reconsider its decision in this case, and it could be given an opportunity to do so, provided this is done with expedition. Consideration could also be given to issuing a judicial review of the decision to refuse to provide transport. This is a very specialist area of law for which the services of a solicitor would be essential.

Other options available include:

1. making an application for a Statement of SEN that specifically enumerates that the child is entitled to the provision of free transport, and
2. requesting the presence of the authors of the letters to attend in person at the presentation to the Members of the Council if possible, and
3. taking all of the information that has been provided to the Cerebra Pro Bono Team to the presentation before the Members of the Council.

JINNY'S STORY

Main topics: *Provision of continence services for a disabled child*
Failure of NHS body to consider the needs of a disabled child

Jinny, who is 8 and has quadriplegic cerebral palsy, was assessed as requiring five continence pads per day. The NHS requested a reassessment within a 4 week period, during term time, to include 3 consecutive days for fluid and 2 weeks for stools. The NHS body remained inflexible about timing, threatening withdrawal of the continence service for failure to comply with their request, leading to Jinny's mother reluctantly considering withdrawing her from school for the reassessment period.

Recommendations: *The NHS body demonstrate greater flexibility here*
Jinny's needs be reassessed during school holidays
The NHS body reviews its current policy

Relevant Law: *Equality Act (2010) s 149*
NHS Constitution (Health Act 2009 s 2)
Human Rights Act (1998) Art 3 & 8

Also: *NICE - Guidance on paediatric continence service (2010)*
Department of Health - Good Practice in Continence Services (2000)

*Note. This is an **English** case.
The law in Wales and the relevant public law principles are very similar.

Summary of Facts

The case concerns Jinny, an 8 year old child with quadriplegic cerebral palsy. Jinny has been assessed as requiring five continence pads each day and the relevant NHS body has requested that a reassessment of this need be undertaken.

Jinny's mother has been advised that this must take place over a 3 day period for fluid and a 2 week period for stools. The NHS body has stipulated that the assessment must be completed within 4 weeks – which means that part of the assessment would have to be undertaken whilst Jinny is at school.

It has been stated in writing by the NHS body that a failure to comply with the required assessment in the specified timescale 'may delay the delivery of continence products'. During a telephone conversation, Jinny's mother has been told that unless the assessment is completed within the specified period, no more continence supplies will be provided. This ultimatum has been issued, notwithstanding that Jinny's community nurse is willing to confirm that the need for continence products remains.

The idea that such an assessment will have to be undertaken at Jinny's school is a matter of great concern to her mother, who is extremely embarrassed to ask the school to do this and believes that Jinny will be

stigmatised in consequence. Indeed she is so concerned that she believes that the only option is to remove Jinny during these two weeks – which is something she does not wish to do.

Relevant Law and Guidance

National Health Service Acts

NHS bodies are subject to the overarching duty to continue the promotion of a comprehensive health service in England and Wales (NHS Act 2006 / NHS (Wales) Act 2006 s1). The public law obligations on such bodies are considered below, but a range of policy and practice documents have been published to illuminate these obligations, including:

The NHS Constitution

NHS bodies in England are required to have regard to the NHS Constitution (Health Act 2009 s2). Of particular relevance in the current context is the 2013 Constitution's emphasis on (1) the need for policies and practices to take into account the individual needs of patients (Principle 4 – 'to put patients at the heart of everything it does'); and (2) the importance of ensuring that policies do not discriminate against patients – even if this is inadvertent (Principle 1 and see also page 6).

National Institute for Health and Clinical Excellence (NICE) *Commissioning Guidance Commissioning a paediatric continence service* (2010)[45]

The 2010 guidance emphasises, amongst other things, that:

- 'Continence problems can have a significant emotional impact, and can increase the risk of bullying and of behavioural problems in children and young people. Managing the problem can be stressful for parents and carers and can strain family relationships';
- 'It is important that treatment is adapted to the needs and circumstances of the child or young person and their family'.
- That a 'key clinical issue is the need for '... reducing unnecessary invasive examinations and procedures'; and
- That Commissioners should ensure that they 'take into account the views of … children and young people and their parents or carers'.

The Department of Health; *Good Practice in Continence Services* (2000)[46]

The guidance advises that:

- health and local authorities should put in place arrangements that ensure children are not excluded from normal pre-school and school educational activities, solely because they are incontinent (para 6.1); and
- if children with incontinence are to attend normal educational activities, systems of care should be implemented that: preserve the dignity and independence of the child or young person and avoids the risk of ridicule or bullying from peers or staff (para 6.6).

National Collaborating Centre for Acute Care (2007) *National Clinical Guideline: The management of faecal incontinence in adults*[47]

Whilst the guidelines are specifically designed for adults, its observations are of relevance in the current context, namely that (para 2.1):

- Faecal incontinence (FI) is a stigmatising condition, affecting men and women of all ages. People with FI commonly experience fear and embarrassment. It can have a distressing impact and restriction on quality of life; in some cases people with symptoms will limit their lives in order to maintain easy access to a toilet in case of an incontinence episode. Treatment of FI should aim not only towards enabling the patient to live with dignity at home, but also to participate in social, leisure, and cultural activities, education, training or work.

Equality Act 2010

Indirect discrimination

Section 19 of the Equality Act 2010 makes unlawful discrimination that arises (amongst other ways) when a policy puts a disabled child at a particular disadvantage when compared to children who do not have a similar impairment and the policy cannot be shown 'to be a proportionate means of achieving a legitimate aim.'

Duty to make reasonable adjustments

Section 20 Equality Act 2010 places a duty on (amongst others) NHS bodies to make reasonable adjustments for disabled persons in the services they provide. This would include the assessment of the need for (and the provision of) continence services.

[45] At www.nice.org.uk/media/0A3/93/PaediatricContinenceCommissioningGuide.pdf

[46] At http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4057529.pdf

[47] At http://www.nice.org.uk/nicemedia/live/11012/30548/30548.pdf

Public sector equality duty
Section 149 Equality Act 2010 places a duty on local authorities to promote equality for (amongst others) disabled people and to eliminate discrimination. In R (Brown) v Secretary of State for Work and Pensions (2008)[48] the duty was held to be one of substance that arose in many routine situations: essentially whenever a public body exercised a public function, including an exercise of judgment that might affect disabled people.

European Convention on Human Rights / Human Rights Act 1998
A failure to provide timely health support to a disabled child, and to threaten its withdrawal, engages both Articles 3 and 8 of the European Convention on Human Rights (Price v UK[49] and R(Bernard) v Enfield.[50] Since domestic law deals so clearly with the facts as presented in this case, this advice does not further consider the relevant Strasbourg case law.

Analysis: Application of the Law to the Facts

NHS bodies must act in accordance with the principles of public law – most obviously they must act lawfully and must take into account (amongst other things) relevant guidance and the views and interests of their patients / carers. Where discretion exists NHS bodies must be prepared to act flexibly and in all matters, they must act 'reasonably', deal with people fairly and with respect (see for example, the Parliamentary and Health Service Ombudsman's *Principles of Good Administration* (2009)). It is not unreasonable that a NHS body would want, periodically, to review a patient's continence services. However, the evidence provided suggests that the way the NHS body has in this case approached this review has fallen short of its public law obligations and there are two particularly problematical aspects:

1. The rigid requirement that the assessment be completed by an arbitrary deadline which has had the effect that the assessment had to be undertaken at a time when the child was at school; and
2. The threat of a penalty for non-compliance, namely the withholding of further continence supplies.

The failure to act with flexibility and to take into account the particular needs of Jinny and her family, are, on the face of it, unreasonable. Most obviously:

1. It would appear that the NHS body has failed to have regard to (or 'proper regard to') Jinny's mother's reasonable concern, namely that her daughter would be at risk of being stereotyped / stigmatised at school (albeit unconsciously by the professional staff). The reference to problems of this kind in the above cited guidance adds credence to this view. The school would have to carry out part of the assessment (relating to the measurement of urine and stools), and one could anticipate that this would be something teachers might feel to be an inappropriate task for them to undertake.
   Given these problems, it is perhaps unsurprising (and not unpredictable) that Jinny's mother believes that the only realistic option is to remove Jinny from school while the assessment takes place. This would place Jinny at a significant disadvantage in educational terms and in consequence engage the Equality Act 2010 obligations cited above. Given that there would appear to be an alternative way of undertaking the assessment (eg during holidays) it calls into question the rigour of the assessment that the NHS body should have undertaken under s149 of the 2010 Act. The existence of relatively simple alternatives also suggests that policy as applied in this case is contrary to sections 19 and 20 of that Act.

2. It must be inappropriate for a NHS body to state that a child's current health support services will be withdrawn if her mother does not comply with the policy. On the specific level, it is improbable that the continence needs of an 8 year old girl with quadriplegic cerebral palsy will diminish and in the present case, this presumption is more compelling given that the community nurse is willing to confirm that the need remains.

Preliminary Conclusions

This is a case where one would hope that the NHS body would undertake a fundamental review of the implementation of the policy and in the instant case demonstrate considerably greater flexibility (for example by allowing the assessment to be undertaken during the school holidays). Whatever solution is adopted, the NHS body's policies and practices must put 'patients at the heart of everything it does' and that in this case, it would appear to have failed.

[48] [2008] EWHC 3158 (Admin).
[49] 34 EHRR 1285
[50] [2002] EWHC 2282 (Admin)

NEVILLE'S STORY

Main topics: *Inflexibility regarding provision of school transport*
Carer's right to an assessment

Neville is 10, autistic, with a statement of SEN, and cared for by a single parent. Currently in university, his mother required the transport bringing Neville home from school to stop occasionally at a childminder's instead. The local authority has been inflexible in its refusal to comply, claiming that "grounds of safety" prevent any arrangement other than "home to school" transport.

Recommendations: *The LA is acting unreasonably*
It cannot issue a "blanket" response
Neville's mother is entitled to a carer's assessment
Neville is a "child in need"
His individual needs must be met by the LA
The LA policy is in breach of the Equality Act
The LA should apologise and offer compensation

Relevant Law: *Education and Inspections Act (2006) s 508B &35 B*
Children Act (1989) Part 1 schedule 2
Carers (Equal Opportunities) Act (2004)
Equality Act (2010) s19 & 20 & 149
Carers and Disabled Children Act (2000) para 71

Also: *Learner Travel (Wales) Measure (2008)*
Framework for the assessment of children in need (2000)
Policy Guidance concerning Carers Acts (DoH 2005)

*Note. This is a **Welsh** case.
The law in England is similar – see Harry's case above.

Summary of Facts

The case concerns Neville, a 10 year old boy with Autism. Neville has a Statement of Special Education Needs (SEN) and attends a school that is named in the Statement. Neville receives transport to and from school each day.

Neville's mother ('Ms Long') is a single parent to both Neville and his siblings. She is in the second year of her university degree and as a result of her university studies, she is occasionally unable to meet Neville at his drop-off time and has arranged for him to be cared for by a child-minder. Ms Long has requested that Neville be dropped at the address of the child-minder when required. In response to this request, Neville was transported once to the address of the child-minder. When subsequently requesting the same arrangement, Ms Long was informed that the LEA's policy only provided for "home to school transport" and this did not extend to the child-minder. Ms Long asked that the local authority reconsider its policy and on the 10th October 2013, she received a letter from the authority stating that 'any requests must be received by the Passenger Transport Unit in advance along with the appropriate application form in order for the authorisation to be considered….'. We are advised that Ms Long then telephoned the LEA to request an application form. During her conversation with the LEA representative she was informed that the letter had been 'badly worded' and there was no application or assessment process. Ms Long was subsequently informed by the LEA representative that only home to school transport was provided.

Ms Long wrote to the LEA and offered to pay for the additional cost of having her son transported to the child-minder. The LEA responded, however the issue of cost was not addressed and the provision of any transport other than home to school was refused based on the unspecified "grounds of safety."

Ms Long has lodged an official complaint with the LEA. She is particularly concerned about the inflexibility of the LEA's alternative transport arrangements. Ms Long has had to remove Neville from school on the days when she is unable to meet him at the drop-off. This is a problem that Ms Long anticipates will continue to occur periodically when she leaves university and begins working.

Relevant Law and Guidance

Education
The principal provisions that govern local authority responsibility for making suitable school and travel arrangements for children are contained in Part 6 of the Education and Inspections Act 2006.

Section 508B of the 2006 Act[51] places a duty on local authorities to put in place for eligible children suitable travel arrangements to facilitate their attendance at school.[52] Section 35B defines an eligible child as being one (having regard to the child's disability) who cannot reasonably be expected to walk to school.

The Learner Travel (Wales) Measure 2008 requires (amongst other things) that Local Authorities assess learner travel needs having regard to the needs of learners who are disabled or have learning difficulties.[53] The Measure creates a duty to make other travel arrangements[54] to ensure the attendance of each child having regard to any specific disability or learning difficulty of the child.[55] The Learner Travel (Wales) Measure 2008 came into force on 10 December 2008. Operational Guidance was issued to all local authorities in order to ensure compliance by 01 April 2009.

Local Education Guidance

Our research indicates that the Local Authority in which Neville resides, has a School Transport Policy currently in force[56]. The policy is general in nature and fails to provide guidance on the arrangements for transport pick-up and drop-off points. The Local Authority has also published a revised transport policy which (it appears) has yet to be implemented[57] but which is considerably more detailed and would appear to be in compliance with The Learner Wales (Travel) Measure 2008.[58]

Statutory Provisions: Social Care

Section 17 of the Children Act 1989[59] places a duty on local authorities to provide services which will (amongst other things) minimise the effect of disabilities on disabled children.[60] Guidance on the 1989 Act is found in the Framework for the Assessment of Children in Need and their Families.[61] The guidance recognises the right of parents to expect practical support from education and healthcare services to aid them in supporting their child[62] to overcome potential disadvantage. To meet this aim the Local Authority must work collaboratively with other support mechanisms[63] to ensure that the child receives the support necessary to be able to achieve optimum success in adulthood.[64]

Statutory Provisions: Carers

Section 6 of the Carers and Disabled Children Act 2000 places a duty on authorities to: (1) inform qualifying carers of their right to a carers' assessment; (2) undertake an assessment where so requested; and (3) to ensure that the assessment considers whether the carer works, or wishes to work and whether the carer has aspirations to engage in training, education and leisure activities.

Guidance for Carers

2005 Policy Guidance concerning the Carers Acts[65] advises that carers' assessments:

> should take account of the parent's ability to provide or continue to provide care for the child and consideration of whether they work, or undertake any education, training or leisure activity or wish to do so. This means that local authorities have a duty to ask carers about these activities and take their wishes into account when planning the care package.

[51] Section 508B(1) states "A local education authority in England must make, in the case of an eligible child in the authority's area to whom subsection (2) applies, such travel arrangements as they consider necessary in order to secure that suitable home to school travel arrangements, for the purpose of facilitating the child's attendance at the relevant educational establishment in relation to him, are made and provided free of charge in relation to the child."

[52] Department for Education and Skills: Home to School Travel and Transport Guidance [2007]

[53] The Learner Travel (Wales) Measure 2008 , Section 2(4)(a)and (b)

[54] The Learner Travel (Wales) Measure 2008, Section 4(1)(c)

[55] The Learner Travel (Wales) Measure 2008, Section 4(5)(d)

[56] [Named Authority] Education Service School Transport Policy - to remain in force until September 2014

[57] [Named Authority] The Revised Home to School / College Transport Policy. No date is given for the intended implementation of the policy. A copy of the policy may be obtained on the local authority's website

[58] Local Authority's website address

[59] Section 17(1) provides that "It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
(a) to safeguard and promote the welfare of children within their area who are in need; and
(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs."

[60] Part 1 Schedule 2 of the Children Act 1989

[61] In England, Department of Health, Department for Education and Employment and Home Office (2000) Framework for assessing children in need and their families (policy guidance) and in Wales, Welsh Assembly Government (2001) Framework for assessing children in need and their families.

[62] Framework for the Assessment of Children in Need and their Families 2000 section1.3

[63] Ibid , section 1.12 states that "The Children Act 1989 places a specific duty on agencies to co-operate in the interests of children in need in section 27. Section 322 of the Education Act 1996 also places a duty on the local authority to assist the local education authority where any child who has special educational need"

[64] Ibid 1.17

[65] Department of Health (2005) 'Carers and Disabled Children Combined Policy Guidance Act 2000 and Carers (Equal Opportunities) Act 2004' para 71)

Practice guidance in relation to the Carers & Disabled Children Act 2000[66] identified the importance of providing assistance to carers in maintaining work, education and training, stating:

> People with parental responsibility for disabled children will also benefit from joining or re-joining the workforce. Such carers often face difficulties re-entering the workforce because of lack of suitable child-care services. Many parents of disabled children would like to return to work and, if they were able to do so, would benefit socially and emotionally as well as financially.

The duty to undertake such assessments in relation to parent carers has been upheld in a number of judgments[67] and Local Government Ombudsmen's reports.[68] A Welsh Ombudsman's report[69] criticised a local authority that failed to provide support to a parent who required respite care to enable him to pursue his university studies – in the Ombudsman's opinion there was an obligation on the authority to ensure that the parent was not 'disadvantaged in pursuit of education/ training any more than other parents'.

Statutory Provisions: Equality / Non-discrimination

Indirect discrimination

Section 19 of the Equality Act 2010[70] makes unlawful discrimination that arises (amongst other ways) when a policy puts a disabled child at a particular disadvantage when compared to children who do not have a similar impairment – and the policy cannot be shown 'to be a proportionate means of achieving a legitimate aim.'[71]

Duty to make reasonable adjustments

Section 20 Equality Act 2010 places a duty on (amongst others) local authorities to make reasonable adjustments for disabled persons in the services they provide. This includes providing transport for children to an address where they can be cared for.[72]

Public Sector Equality Duty

Section 149 Equality Act 2010 places a duty on local authorities to promote equality for (amongst others) disabled people and to eliminate discrimination. The Equalities Office has published a guide to assist public authorities to comply with their public sector duty under the Equality Act 2010.[73]

Principles of Public Law

Fettering of Discretion

Where a public authority is required to perform a duty, it cannot apply 'blanket' policies which do not allow for exceptions. In R v Eastleigh BC ex p Betts,[74] it was held that a public body is entitled to develop and follow a general policy as to how it provides a particular service. However, the principle that a public body must be prepared to consider individual cases on their particular merits is well established in law in England and Wales and has been upheld in numerous cases, including analogous cases related to social care.[75]

The Duty to Act Rationally

A public body is required to act reasonably in the discharge of its functions and in making any decision it is required to take account of all the relevant considerations and to act rationally.[76]

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[66] Department of Health (2001) Carers and people with parental responsibility for disabled children para 36

[67] See for example R (LH and MH) v Lambeth LBC [2006] EWHC 1190 (Admin); HN (A Minor) [2010] NIQB 86 a case concerning Article 18A Children (Northern Ireland) Order 1995 which in material terms, is indistinguishable from s1(2) Carers (Recognition and Services) Act 1995)

[68] See for example Complaint No 07B 04696 and 07B 10996 against LB Croydon 16th September 2009, and Local Government Ombudsman's Digest of Cases (Education) 2008/09 Report 06B04654, pp14–15.

[69] Public Service Ombudsman (Wales) Complaint No. B2004/0707/S/370 against Swansea City Council 22 February 2007 see in particular paras 78, 133 &137.

[70] Section 19 provides that:
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

[71] See for example, G v St Gregory's Catholic Science College [2011] EWHC 1452 (Admin). Although in this case the school had failed to undertake an equality impact assessment (see below) concerning the policy, this was not considered by the court to be conclusive – although material – as to whether the policy could be justified.

[72] Section 20(3) applies where "… where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

[73] Home Office Equalities Office, (211) 'Public sector: quick start guide to the public sector Equality Duty'.

[74] [1983] 2 AC 613, HL

[75] See for example, R v Warwickshire County Council ex p Collymore [1995] ELR 217; R v Ealing LBC ex p Leaman (1984) Times 10 February; and R v Bexley LBC ex p Jones [1995] ELR 42 p55.

[76] See generally Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.

Analysis: Application of the Law to the Facts

The Duty to Consider the Sustainability of the Carer's Role

The evidence provided suggests that Ms Long has not been offered or provided with a carer's assessment that complies with the requirements of the carers' legislation – and in particular an assessment that pays proper regard to her need to remain in university education.

Principles of Public Law

The local authority is required to have a transport policy that is compliant with the Learner Transport (Wales) Measure 2008 and to have a process by which Neville's individual needs will be considered. No evidence has been provided to indicate that the authority is complying with its statutory duty in this regard.

The evidence provided suggests that the local authority has not considered Neville's individual needs (as a disabled child) for flexible transport arrangements and that it has applied a blanket policy to all cases, with the consequence that there is no scope for flexibility in home to school transport arrangements. Such a policy arguably constitutes an unlawful fettering of the authority's duties and powers in this context.

Without further explanation, on the face of it, the letter sent on 10th October 2013 by the local authority would appear to be unlawful on the basis of irrationality

Compliance with the Equality Act 2010

Indirect Discrimination

Neville's local authority adheres – it appears – to the policy that "children will only be transported to and from school from one address." A rigid application of this policy places some disabled children (such as Neville) at a disadvantage when compared to children who are not disabled. In the absence of evidence to the contrary, the application of the local authority's Home to School Transport Address Policy to disabled children, including Neville, is contrary to s.19 of the Equality Act 2010.

Failure to make reasonable adjustments

The 'reasonable adjustment' duty under s.20 of the 2010 Act reinforces the general duty under s19 by creating a specific obligation to consider making actual adjustments to a policy in individual cases. As with the s19 duty, we have seen no evidence that in the present case, this obligation has been considered or applied so as to mitigate the disadvantage Neville is experiencing. The absence of such evidence suggests that the authority has failed to address properly its s.20 obligations under the 2010 Act.

Public Sector Equality Duty

From the above analysis, given the absence of a general statement of policy amelioration of the "one address rule" in relation to disabled children or any specific discussion by the authority as to its application in Neville's case, the evidence suggests that the local authority has failed to fulfil its duties under s.149 of the Equality Act 2010, to promote equality for disabled people and to eliminate discrimination.

Preliminary Conclusions

The Cerebra Pro Bono Team's preliminary conclusions are therefore that the local authority:

1. is in breach of its statutory duty to have a policy in place which complies with the Learner Transport (Wales) Measure 2008.
2. has acted unreasonably by failing to consider Neville's need for flexible transport and that this is compounding the impact of his disability upon his education.
3. has acted unreasonably in failing to inform or carry out a carer's assessment on Ms Long
4. is not acting in compliance with its obligations towards disabled children under the Equality Act 2010.
5. is fettering its discretion by seeking to apply a blanket policy and not considering the impact of denying flexible transport arrangements to Neville and his carer, Ms Long.
6. created a legitimate expectation of a process of application when it wrote to Ms Long on 10th October 2013.

Remedies

The Local Government Ombudsman has issued detailed information and practice guidance aimed at promoting greater consistency in the remedies recommended.[77] The guidance notes that an appropriate remedy may require a number of separate elements, including recommendations as to specific action that should be taken and as to an apology. As a general principle, the remedy needs to be 'appropriate and proportionate to the injustice; it should, as far as possible, put the complainant

[77] LGO (2005) Guidance on good practice 6: remedies.

in the position he or she would have been in but for the maladministration'. Where 'this cannot be achieved because of the passage of time or of events which have occurred ... financial compensation may be the only available approach'.[78]

It would appear to follow that:

1. As a result of the Council's fault and delay Neville and his mother have been caused considerable distress, anxiety and inconvenience for which the ombudsman's guidance would suggest that a formal apology and a payment should be made in recognition of this injustice – not least to compensate Ms Long for the significant unnecessary time and trouble she has been put to in pursuing matters with the Council and for the lost schooling that Neville has experienced.
2. The Council should, within 10 working days of receiving this advice, confirm in writing that it will provide flexible travel support to meet Ms Long's reasonable needs.
3. The Council should, within 10 working days of receiving this advice, confirm in writing that it will provide Ms Long with a carer's assessment – such assessment to be completed within 20 working days of receiving this advice.

BECKY'S STORY (THE LAW IN WALES)

Main topics: *Inflexibility of support services*
Children and Adolescent Mental Health Services (CAMHS)

Aged 16, Becky has Asperger's, and her mental health problems led to a stay in a CAMHS unit which subsequently resulted in a loss of schooling. Support available after this stay was negligible, and family therapy was offered at a time inconvenient both for Becky, who would have to miss more school, and for her working parents. The service remained inflexible about this offer.

Recommendations: *The LA cannot apply a "blanket" policy*
Becky is a "child in need"
The LA has a duty to meet her individual needs
Her educational needs must also be met
Becky's parent carers are entitled to work
The appointment time must be convenient
There should be an apology for the delay

Relevant Law: *Children Act (1989)s 1(3)(b)*
NHS Act (2006 Wales) s1(1) & s1(2), s3(1e) & (1f)
Mental Health Act (1983)
Carers Acts (1995) s1(2) and (2000) s 2

Also: *National Service Framework for Children (Wales)*
Mental Health Act Code of Practice (Wales)
Service standards for CAMHS (2011)

Summary of Facts

The case concerns a 16-year-old child, Becky. Becky has a diagnosis of Asperger's syndrome and connected mental health problems for which she recently required a four month inpatient stay in a CAMHS unit. As a result, Becky has missed a significant amount of school and has fallen behind in her school work. This has in turn impacted on her health.

On leaving the CAMHS unit Becky's assessment recognised the importance of family therapy support as part of her discharge plan. Despite a promise that she would have CAMHS support at home, Becky received only one appointment in the initial seven weeks following discharge. Following requests from her parents, Becky and her parents were then offered a session with a family therapist.

The family therapy service was only prepared to offer appointments between 9am and 5pm on weekdays, with the last appointment taking place at 4pm. Becky and her family live in a rural area and it is a 45 minute drive from Becky's school to the hospital where the family therapy service is offered. As a result, an appointment within these times would require Becky to miss further school and her parents to take time off work.
Becky's parents have advised the Service that they do not

want Becky to miss further school as this is likely to cause her problems, both psychologically and educationally; and that it is very difficult for them to attend at the times offered as they have already taken significant time off work to support Becky. In response, the service stated that children typically miss school and parents take time off to attend appointments.

The Service has agreed to arrange an appointment at 4.15pm (the time that the school bus arrives in the town where the hospital is), but has not offered any other flexibility. As it is a further 10 minute drive from the town to the hospital, the earliest time Becky can attend an appointment is 4.25. An appointment at this time would still require Becky's parents to take time off work to attend.

Relevant Law and Guidance

The Children Act 1989

The principal legislation underpinning the CAMHS regime is the Children Act 1989.[79] Section 1(3) of this Act establishes a set of principles which are required to guide any decision made in relation to a child. The overriding principle is the welfare of the child and further considerations include (at sub-section 1(3)(b)) the child's physical, emotional and educational needs.

The NHS (Wales) Act 2006

Section 1(1) of the NHS (Wales) Act 2006 places a duty on the Welsh Government to promote a comprehensive health service designed to improve both the physical and mental health of the people of Wales and the prevention, diagnosis and treatment of illness. Under s1(2) the Welsh Government is under a duty to ensure the provision of services in accordance with the Act.

Section 3(1)(e) and (f) of the 2006 Act place a duty on the Welsh Government to provide (to the extent that it considers necessary) services / facilities for the prevention of illness, the care and after-care of people suffering from illness and the diagnosis and treatment of illness. The 2006 Act therefore makes provision for a comprehensive and accessible health service, including mental health services and CAMH services.[80]

The National Service Framework for Children (Wales)

The National Service Framework (NSF) is a policy framework with which all public services in Wales are expected to comply.[81] It contains the following provisions:

Section 2.13

"All health settings [should] have appointment systems which include a booking system that is flexible and takes account of the needs of children and their families"

Section 2.34

"Service providers [should] work together to develop protocols to ensure the successful reintegration of children and young people who have been absent from school due to hospital episodes or other long term illness, pregnancy, care or custodial placements away from their family and community, mental health problems, personal difficulties or a period of exclusion".

Section 7.9

"Clinics [should be] offered at times and in locations which result in minimum disruption to schooling. Families/carers are given the option of attending an outreach clinic, where available, or travelling to a specialist centre for follow up, if they would prefer".

The Mental Health Act 1983

The care and treatment of patients with a mental disorder are regulated by (amongst other legislation) the Mental Health Act 1983, including patients and former patients of CAMHS units.

The Mental Health Act 1983 Code of Practice for Wales ("the Code")

The Code provides guidance to medical practitioners, approved clinicians, managers and staff of hospitals on how they should carry out their functions under the Mental Health Act 1983 and certain aspects of medical treatment for mental disorder more generally. Such professionals are required to have regard to the Code in carrying out their functions under the Act.[82] Breaches of the Code can give rise to a legal challenge.

Chapter 33 of the Code provides guidance regarding children and young people who suffer from mental disorder and provides guiding principles which should inform decision-making for all children regardless of whether they are subject to detention.

[79] National Assembly for Wales (2001). *Everybody's Business: Child and Adolescent Mental Health Services Strategy Document*, para 2.4.
[80] See Broach, Clements and Read (2010) Disabled children: a legal handbook, Legal Action Group. Chapter 5, paras 5.16-5.18 and 5.67.
[81] The NSF can be found at: http://www.wales.nhs.uk/sites3/Documents/441/EnglishNSF%5Famended%5Ffinal.pdf
[82] *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148.

- Paragraph 33.5 of the Code states that services for children must be holistic, flexible and centred on the needs, opinions, cultures and life-styles of children.
- Paragraph 33.6 of the Code states that the best interests of each child must always be the primary consideration and that any intervention in the life of each child that is considered necessary because of their mental disorder should be the least restrictive and least stigmatising option consistent with effective care and treatment.
- Paragraph 33.8 of the Code states that all patients aged 16 or 17 who want to continue their education should not be denied access to learning because they are receiving medical care and treatment.

Service standards for CAMHS (2011)

A further relevant consideration in this case is the 'Service Standards for CAMHS' published jointly by the Royal College of Psychiatrists and Quality Networks for Community CAMHS.[83] The 'standards' advise (amongst other things) that:

> 'Appointments are flexible and responsive to the needs of young people and their parents/carers' and that, 'For example, young people and their parents/carers can choose a suitable appointment time and appointments can be offered out of school or college hours; home-based or school-based treatments are offered where appropriate' (para 1.3.2);

and that:

> 'Young people receive mental health assessments within acceptable timescales according to service specification or Trust policy. Guidance: A maximum of 5 weeks for non-urgent assessments and as promptly as possible to prevent escalation of the problem and avoidable crises' (para 2.1.1).

Carers (Recognition and Services) Act 1995

Section 1(2) of the Carers (Recognition and Services) Act 1995[84] as amended places a duty on the relevant children's services authority (once aware of a disabled child in their area having care needs) to advise carers such as Becky's parents of their right to request an assessment of their ability to provide and continue to provide care (a 'carers assessment').

Where a carer makes such a request, the local authority must carry out a carers' assessment and in so doing, must consider whether the carer(s) works or wishes to work or wishes to engage in education, training of leisure activities. Following such an assessment the local authority is required to consider whether it should provide support for the carer(s).

Section 82 NHS Act 2006 places a duty on health bodies to cooperate with local authorities and the relevant guidance[85] requires that health bodies identify relevant carers and provide them with information about:

> their right to request an assessment of their own needs. Services should ensure co-ordination of users' and carers' assessments, care and support plans and the exchange of information where agreement has been received to do this.

Principles of Public Law

Where a public authority is required to perform a duty, it cannot apply 'blanket' policies which do not allow for exceptions.[86] While a health body has discretion as to how it discharges its duties under the NHS (Wales) Act 2006 and is entitled to have and follow general policies in doing so, it is not entitled to apply a blanket policy: to 'fetter its discretion'.

Public bodies are required to act reasonably in carrying out their duties – and when making decisions they must take into account all the relevant considerations including relevant guidance.[87] One such consideration in the present case is Becky's psychological state and the circumstances of her recent difficulties in attending school.

Analysis: Application of the Law to the Facts

Given Becky's absence from school for four months and the psychological and educational impact this has had upon her, the Service is obliged (in so far as it is able) to minimise or eliminate any potentially detrimental impact of its policies on her.

[83] Services Standards for Community CAMHS 3rd edition, R Barrett, C Butler, E Collins, A O'Herlihy and P Thompson (eds) Royal College of Psychiatrists and Quality Networks for Community CAMHS (2011).

[84] This duty is reinforced by section 6 of the Carers and Disabled Children's Act 2000.

[85] Department of Health (2008) Refocusing the Care Programme Approach: Policy and Positive Practice Guidance. London: Department of Health p.25.

[86] See for example, *R v Eastleigh BC ex p Betts*, [1983] 2 AC 613, HL; and in the context of social care, *R v Warwickshire County Council ex p Collymore* [1995] ELR 217; *R v Ealing LBC ex p Leaman* (1984) Times 10 February; and *R v Bexley LBC ex p Jones* [1995] ELR 42 p55.

[87] See generally *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 – and for example, *R v Avon County Council ex p M* [1994] 2 FLR 1006; (1999) 2 CCLR 185.

The relevant guidance (cited above) outline the standards that a CAMH service is expected to meet. It would appear, from the information provided, that in operating a system which undermines Becky's successful reintegration to school and which expects (and indeed promotes) disruption to school attendance, the Service is departing so widely from the requirements of the relevant guidance as to call into question the legality of its policies.
The information provided suggests that the Service has adopted an overly rigid appointments policy in terms of the times and locations it offers and this would appear to be prima facie unlawful. The Service is not entitled to state that a particular policy applies, without being prepared to consider whether it is necessary to make an exception for Becky.

While the Service is not bound by the statutes placing a duty on local authorities to provide carers' assessments, that legislation is a clear statement of the principle that carers are entitled to work and should be assisted to do so. The expectation on the part of the Service that Becky's parents should take time off work to attend family therapy appointments breaches this legal principle and the above cited relevant guidance.

Preliminary Conclusions

Based on the information we have received, and the above analysis, our preliminary opinion is therefore that:

1. It is unlawful for the Service to adhere to an appointments' policy which fails to place overriding importance on the welfare of children and young people using the Service.

2. It is unlawful for the Service to apply a blanket policy in relation to appointment times without (at the very least) being prepared to consider exceptions.

3. It is prima facie unlawful for the Service to apply the same policy to all service users, where service users' circumstances may be materially different.

4. In considering whether to make an exception in relation to Becky, the Service must have regard to all relevant considerations, including Becky's educational and psychological status.

5. It is unlawful for the Service to apply a policy or practice which places young people of certain ages at an educational disadvantage.

Remedies

Given the analysis above, it follows that:

1. The Service should make expedited arrangements:

a) To confirm (e.g. within one week) that a family therapy appointment will be offered to the family at a time that is convenient for them (for example in the evening or at a weekend) and to make arrangements with the family for such an appointment to be held;

b) To provide (e.g. within three weeks) an appointment at such an appropriate time.

2. The family is due an apology for the delay and maladministration that has characterised the approach of the Service to this issue in the past.

3. The facts disclosed by this referral point to there being a structural failing within the relevant CAMH service. If the serious problems experienced by Becky and her family are addressed (i.e. in 1 and 2 above) it may be that there is nothing further that is required of the CAHM service in this individual case. A public body having had these shortcomings drawn to its attention would, however, be expected to undertake a wide-ranging appraisal as to whether these problems are systemic, are being experienced by other families, and if so, to prepare a plan as to how these failings will be remedied.

BECKY'S STORY (THE LAW IN ENGLAND)

Main topics: *Inflexibility of support services*
Children and Adolescent Mental Health Services (CAMHS)

Aged 16, Becky has Asperger's, and her mental health problems led to a stay in a CAMHS unit which subsequently resulted in a loss of schooling. Support available after this stay was negligible, and family therapy was offered at a time inconvenient both for Becky, who would have to miss more school, and for her working parents. The service remained inflexible about this offer.

Recommendations: *The LA cannot apply a "blanket" policy*
Becky is a "child in need"
The LA has a duty to meet her individual needs
Her educational needs must also be met
Becky's parent carers are entitled to work
The appointment time must be convenient
There should be an apology for the delay

Relevant Law: *Children Act (1989)s 1(3)(b)*
NHS Act 2006 s1(1) & s1(2), s3(1e) & (1f)
Mental Health Act (1983)
Carers Acts (1995) s1(2) and (2000) s 2

Also: *National Service Framework for Children (Wales)*
Mental Health Act Code of Practice (England)
The National Service Framework for Children, Young People and Maternity Services (NSF)
Service standards for CAMHS (2011)

Summary of Facts

The case concerns a 16-year-old child, Becky. Becky has a diagnosis of Asperger's syndrome and connected mental health problems for which she recently required a four month inpatient stay in a CAMHS unit. As a result, Becky has missed a significant amount of school and has fallen behind in her school work. This has in turn impacted on her health.

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The family therapy service was only prepared to offer appointments between 9am and 5pm on weekdays, with the last appointment taking place at 4pm. Becky and her family live in a rural area and it is a 45 minute drive from Becky's school to the hospital where the family therapy service is offered. As a result, an appointment within these times would require Becky to miss further school and her parents to take time off work.

Becky's parents have advised the Service that they do not want Becky to miss further school as this is likely to cause her problems, both psychologically and educationally; and that it is very difficult for them to attend at the times offered as they have already taken significant time off work to support Becky. In response, the Service stated that children typically miss school and parents take time off to attend appointments.

The Service has agreed to arrange an appointment at 4.15pm (the time that the school bus arrives in the town where the hospital is), but has not offered any other flexibility. As it is a further 10 minute drive from the town to the hospital, the earliest time Becky can attend an appointment is 4.25. An appointment at this time would still require Becky's parents to take time off work to attend.

Relevant Law and Guidance

The Children Act 1989

The principal legislation underpinning the CAMHS regime is the Children Act 1989.[88] Section 1(3) of this Act establishes a set of principles which are required to guide any decision made in relation to a child. The overriding principle is the welfare of the child and further considerations include (at sub-section 1(3)(b)) the child's physical, emotional and educational needs.

The NHS Act 2006

Section 1(1) of the NHS Act 2006 places a duty on the Secretary of State to promote a comprehensive health service designed to improve both the physical and mental health of the people of England and the prevention, diagnosis and treatment of illness. Under s1(2) the Secretary of State is under a duty to ensure the provision of services in accordance with the Act.

Section 3(1)(e) and (f) of the Act place a duty on the Secretary of State to provide (to the extent considered necessary) services / facilities for the prevention of illness, the care and after-care of people suffering from illness and the diagnosis and treatment of illness.
The 2006 Act therefore makes provision for a comprehensive and accessible health service, including mental health services and CAMH services.[89]

The National Service Framework for Children, Young People and Maternity Services (NSF)

The NSF is a policy framework with which all public services in England are expected to comply.[90] It comprises an overarching policy document (the 'NSF') and a subset of specialist documents, including one that relates to 'Disabled Children, Young People and those with Complex Health Needs' (in this opinion referred to as the 'NSF for Disabled Children') and one that relates to 'the Mental Health and Psychological Well-Being of Children and Young People' (in this opinion referred to as the 'NSF for Mental Health'). The following extracts from these three documents are of particular relevance to this opinion, namely:

- Inclusiveness can be promoted by providing a welcoming and responsive environment for discussions with children, young people and their families, and ensuring that meeting times and locations are sensitive to providing local access, travel, childcare and other personal needs.[91]
- Specific effort is needed to ensure that accessible and good quality health services are available to all, particularly to children and young people in special circumstances. The provision of community-based services … can be effective in improving access for children and young people in rural areas (or with transport difficulties) …[92]
- Ensuring that high quality services are also accessible to children and young people who live in rural areas is an important factor in improving the delivery of services for children and young people. For example, the distance that families have to travel to access health services can have a negative effect on the health outcomes for children and young people from rural communities, as well as adding an extra level of stress and exertion.[93]
- … [Health bodies should] maximise the provision of health and social care services to children, young people and their families in accessible community settings … that are open outside school hours and term time to cater for working parents.[94]
- Young people in special circumstances receive targeted and/or specialist services to meet their needs which are easily accessible and of the same standard in all settings.[95]
- Wherever possible, children and young people are offered appointments at school or outside school hours, to ensure a minimum absence from school;[96]
- Children and young people and their carers want to be able to access services easily. The location should be easy to get to and well-publicised.[97]

[88] National Assembly for Wales (2001). *Everybody's Business: Child and Adolescent Mental Health Services Strategy Document*, para 2.4.
[89] See Broach, Clements and Read (2010) Disabled children: a legal handbook, Legal Action Group. Chapter 5, paras 5.16-5.18 and 5.67.
[90] The NSF can be found at: https://www.gov.uk/government/publications/national-service-framework-children-young-people-and-maternity-services
[91] NSF Standard 3, para 3.5
[92] ibid para 7.4
[93] ibid para 7.5
[94] ibid para 7.6
[95] NSF Standard 4 para 4
[96] ibid
[97] NSF for Mental Health Standard 9 para 6.1

- For some children and young people and their families, initial access may best be provided in a location of their choice (e.g. school, general practice, or home) with the appropriate facilities. … [Health bodies should] address the need to take services closer to children and young people (e.g. by providing school-based and family/health-centre based services) …[98]

The Mental Health Act 1983

The care and treatment of patients with a mental disorder are regulated by (amongst other legislation) the Mental Health Act 1983, including patients and former patients of CAMHS units.

Code of Practice for the Mental Health Act 1983

The Code provides guidance to medical practitioners, approved clinicians, managers and staff of hospitals on how they should carry out their functions under the Mental Health Act 1983 and certain aspects of medical treatment for mental disorder more generally. Such professionals are required to have regard to the Code in carrying out their functions under the Act[99] para 36.4 reminds health professionals that:

> 'any intervention in the life of a child or young person that is considered necessary by reason of their mental disorder should be the option that is least restrictive and least likely to expose them to the risk of any stigmatisation, consistent with effective care and treatment, and it should also result in the least possible separation from family, carers, friends and community or interruption of their education, as is consistent with their wellbeing;'

Service standards for CAMHS (2011)

A further relevant consideration in this case is the 'Service Standards for CAMHS' published jointly by the Royal College of Psychiatrists and Quality Networks for Community CAMHS.[100] The 'standards' advise (amongst other things) that:

> 'Appointments are flexible and responsive to the needs of young people and their parents/carers' and that, 'For example, young people and their parents/carers can choose a suitable appointment time and appointments can be offered out of school or college hours; home-based or school-based treatments are offered where appropriate' (para 1.3.2);

and that:

> 'Young people receive mental health assessments within acceptable timescales according to service specification or Trust policy. Guidance: A maximum of 5 weeks for non-urgent assessments and as promptly as possible to prevent escalation of the problem and avoidable crises' (para 2.1.1).

Carers (Recognition and Services) Act 1995

Section 1(2) of the Carers (Recognition and Services) Act 1995[101] as amended places a duty on the relevant children's services authority (once aware of a disabled child in their area having care needs) to advise carers such as Becky's parents of their right to request an assessment of their ability to provide and continue to provide care (a 'carers assessment').

Where a carer makes such a request, the local authority must carry out a carers' assessment and in so doing, must consider whether the carer(s) works or wishes to work or wishes to engage in education, training of leisure activities. Following such an assessment the local authority is required to consider whether it should provide support for the carer(s).

Section 82 NHS Act 2006 places a duty on health bodies to cooperate with local authorities and the relevant guidance[102] requires that health bodies identify relevant carers and provide them with information about:
their right to request an assessment of their own needs.
Services should ensure co-ordination of users' and carers' assessments, care and support plans and the exchange of information where agreement has been received to do this.

Principles of Public Law

Where a public authority is required to perform a duty, it cannot apply 'blanket' policies which do not allow for exceptions.[103] While a health body has discretion as to how it discharges its duties under the NHS Act 2006 and is entitled to have and follow general policies in doing so, it is not entitled to apply a blanket policy: to 'fetter its discretion'.

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[98] NSF for Mental Health Standard 9 para 6.4

[99] *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148.

[100] Services Standards for Community CAMHS 3rd edition, R Barrett, C Butler, E Collins, A O'Herlihy and P Thompson (eds) Royal College of Psychiatrists and Quality Networks for Community CAMHS (2011).

[101] This duty is reinforced by section 6 of the Carers and Disabled Children's Act 2000.

[102] Department of Health (2008) Refocusing the Care Programme Approach: Policy and Positive Practice Guidance. London: Department of Health p.25.

[103] See for example, *R v Eastleigh BC ex p Betts*, [1983] 2 AC 613, HL; and in the context of social care, *R v Warwickshire County Council ex p Collymore* [1995] ELR 217; *R v Ealing LBC ex p Leaman* (1984) Times 10 February; and *R v Bexley LBC ex p Jones* [1995] ELR 42 p55.

Public bodies are required to act reasonably in carrying out their duties – and when making decisions they must take into account all the relevant considerations including relevant guidance.[104] One such consideration in the present case is Becky's psychological state and the circumstances of her recent difficulties in attending school.

Analysis: Application of the Law to the Facts

Given Becky's absence from school for four months and the psychological and educational impact this has had upon her, the Service is obliged (in so far as it is able) to minimise or eliminate any potentially detrimental impact of its policies on her.

The relevant guidance (cited above) outline the standards that a CAMH service is expected to meet. It would appear, from the information provided, that in operating a system which undermines Becky's successful reintegration to school and which expects (and indeed promotes) disruption to school attendance, the Service is departing so widely from the requirements of the relevant guidance as to call into question the legality of its policies.

The information provided suggests that the Service has adopted an overly rigid appointments policy in terms of the times and locations it offers and this would appear to be prima facie unlawful. The Service is not entitled to state that a particular policy applies, without being prepared to consider whether it is necessary to make an exception for Becky.

While the Service is not bound by the statutes placing a duty on local authorities to provide carers' assessments, that legislation is a clear statement of the principle that carers are entitled to work and should be assisted to do so. The expectation on the part of the Service that Becky's parents should take time off work to attend family therapy appointments breaches this legal principle and the above cited relevant guidance.

Preliminary Conclusions

1. It is unlawful for the Service to adhere to an appointments' policy which fails to place overriding importance on the welfare of children and young people using the Service.
2. It is unlawful for the Service to apply a blanket policy in relation to appointment times without (at the very least) being prepared to consider exceptions.
3. It is prima facie unlawful for the Service to apply the same policy to all service users, where service users' circumstances may be materially different.
4. In considering whether to make an exception in relation to Becky, the Service must have regard to all relevant considerations, including Becky's educational and psychological status.
5. It is unlawful for the Service to apply a policy or practice which places young people of certain ages at an educational disadvantage.

Remedies

Given the analysis above, it follows that:

1. The Service should make expedited arrangements:

(a) To confirm (e.g. within one week) that a family therapy appointment will be offered to the family at a time that is convenient for them (for example in the evening or at a weekend) and to make arrangements with the family for such an appointment to be held;

(b) To provide (e.g. within three weeks) an appointment at such an appropriate time.

2. The family is due an apology for the delay and maladministration that has characterised the approach of the Service to this issue in the past.
3. The facts disclosed by this referral point to there being a structural failing within the relevant CAMH service. If the serious problems experienced by Becky and her family are addressed (i.e. in 1 and 2 above) it may be that there is nothing further that is required of the CAHM service in this individual case. A public body having had these shortcomings drawn to its attention would, however, be expected to undertake a wide-ranging appraisal as to whether these problems are systemic, are being experienced by other families, and if so, to prepare a plan as to how these failings will be remedied.

[104] See generally *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 – and for example, *R v Avon County Council ex p M* [1994] 2 FLR 1006; (1999) 2 CCLR 185.

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CEREBRA LEGAL ENTITLEMENTS RESEARCH PROJECT AT CARDIFF LAW SCHOOL

Background Entitlements

The laws of the four nations of the UK place enforceable duties on public bodies to provide education, health and social care support for disabled children. The research evidence suggests that disabled children and their families experience considerable difficulties in accessing these rights and, in consequence, in receiving good quality health, social care and educational provision.

Cerebra is a unique charity set up to help improve the lives of children with neurological conditions. Cerebra has commissioned a series of 'rights' advice guides and precedent letters, to be used by the parents and advisers of disabled children who are experiencing problems with statutory agencies (such as children's social services, local education authorities and the NHS). Whilst the guides and precedent letters have proven to be an excellent resource, it is recognised that parents and advisers often need to be supported when making such representations against the statutory agencies.

Aims of the Research Project

It is against this background that the Cerebra Legal Entitlements Research Project has been established (with funding support from Cerebra) at Cardiff Law School. Its aims are:-

1. To provide support for disabled children, their families and advisers, who are encountering difficulties with the statutory agencies in relation to the provision of health care, social care and education;

2. To identify why problems occur concerning the discharge by public bodies of their statutory functions;

3. To identify accessible and effective procedures that enable disabled children and their families to maximise the benefits of their legal entitlements;

4. To identify effective ways by which legal entitlements can be delivered to disabled children and their families.

For further information on the programme see www.law.cf.ac.uk/probono/cerebra.html

For access to the programme see www.cerebra.org.uk/english/gethelp/legalhelp/pages/default.aspx

Cerebra

Cerebra is a unique charity set up to help improve the lives of children with neurological conditions through research, education and directly supporting the children and their carers. For further information concerning its work and / or to make a donation visit www.cerebra.org.uk

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