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Cerebra Legal Entitlements Research Project

Digest of Opinions

2014

Cardiff Law School

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CEREBRA LEGAL ENTITLEMENTS RESEARCH PROJECT AT CARDIFF LAW SCHOOL

Digest of Opinions: 2014

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, social care and education.

This Digest is a selection of the Opinions produced by the Project in 2014. All the young people's names have been fictionalised. The opinions were prepared during 2014 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 focusing, 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 2014 particular thanks are due to Irwin Mitchell solicitors, Foot Anstey Solicitors; Watkins and Gunn solicitors Newport; Monckton Chambers London; and St John's Chambers, Bristol.

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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

Copies of each story and the Digests can be accessed at www.law.cf.ac.uk/probono/cerebra_opinions.html

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INTRODUCTION

This Digest contains 13 of the cases on which advice was given by the Cerebra Legal Entitlements Research Project (LERP) in 2014. In addition, due to the number of referrals concerning disabled children being bullied at school, the Digest includes an overview of the legal duties educational establishments and councils owe to disabled children in such situations.

All the opinions in the 2014 Digest relate to cases that concern problems experienced by families in England. Although the programme takes referrals from both England and Wales (and several of the cases in the 2013 Digest concerned families in Wales) – it so happens that 2014 was a year dominated by English referrals. While the law in England and Wales is not always the same, in general terms disabled children and their families have the same rights in both nations – it is just that these rights sometimes derive from differently named Acts and Regulations. It is also the case that the laws concerning social care, education and 'carers' rights are undergoing significant change in England in 2015 and in Wales in 2016. None of the legal changes will diminish the rights referred to in this Digest – although the names of the Acts on which these rights are based will change.

Our understanding of the law can also change as a result of court decisions and this should be born in mind – although the obligation on public bodies to act reasonably does not change.

A recurring theme in many of the cases is that of delay – delay in carrying out assessment processes (on which almost all rights to social care, education and healthcare depend): delay in putting in place support services or adaptations; delay in responding to expressions of concern by families. Three other commonly occurring problem highlighted by these cases concern: (1) the impersonal nature of the processes to which families are subjected: the use of standard / prescriptive assessment forms; the use of less skilled / trained assessors with ever higher caseloads; the use of 'panels'/ senior managers in over-ruling the judgments of the assessors who had actually seen and discussed the family's needs; (2) the failure of public bodies to have proper regard to their obligations under the Equality Act 2010; and (3) the failure to address the impact of caring: not only the impact experienced by parent carers, but also by the siblings of disabled children – some of whom are 'young carers'.

The Digest commences with cases concerning adaptations to the homes of disabled children in order to make them more accessible and safer for the child and family. Delay is (again) a common problem , but other issues also arise – one of which is illustrated by Rosi's Story (page 8) which concerns the need for a separated spouse's home to have adaptations to enable their child to be able to spend quality time with them.

A series of opinions relate to councils refusing to make direct payments to families and the refusal to make available adequate respite care (sometimes referred to as 'short-breaks') whereby the disabled child receives care (such as a sitting service or after school club or in a separate care setting) so that his or her parent can have a break from caring. The referrals suggest that a number of councils have an unlawful 'blanket' policy of refusing to make such support available if it is required in order to sustain the parent's work / employment.

Important opinions also concern the needs of disabled children for privacy / respect for their choice over those involved in their intimate care; the rights of families to key documents (eg assessments and care plans); the format of a 'Freedom of Information' request; and the rights of parents whose children are 'accommodated' by a local authority.

As with the 2013 Digest, issues concerning School transport continued to figure in the referrals to the programme – and this Digest contains 4 new opinions on aspects of this issue.

ARTHUR'S STORY

Main topics: *Delay in assessing and providing disabled facilities / adaptations to a disabled child's home.*

Arthur is 3 and has severe impairments including global development delay and a need to be tube fed at night. In response to a request by his parents for assistance with adaptations / disabled facilities to their home the local authority has: (a) explained that there is a severe delay for assessments and for the provision of such support; and (b) made no constructive suggestion as to what the family should do in the interim.

Summary of Facts

This advice concerns Arthur, a three year old boy who has been diagnosed with autism and global development delay, and has a range of associated complex medical conditions – including a need to be tube fed at night. Arthur has recently undergone various medical assessments at a specialist Children's hospital where the clinicians have stressed the need for adaptations to Arthur's home: in particular to his bedroom.

In response to a request by Arthur's parents for an assessment to enable the adaptations to be undertaken, the relevant local authority (which is both a children's services and a housing authority) advised that: (a) there is a standard delay of at least six months before assessments can be undertaken; and (b) that even if the assessment is positive, there would be a lengthier delay in funding the necessary work / equipment. In the interim, the authority advised that Arthur's mother should sleep on a mattress on the floor with him.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989
For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'. This definition is also the definition of a disabled person for the purposes of the Chronically Sick and Disabled Persons Act 1970 and the Housing, Construction and Regeneration Act 1996 (considered below).

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families. In pursuance of this requirement, the Act places a duty on local authorities to provide a 'range and level of services appropriate to those children's needs'.

Schedule 2 Part 1 para 6 of the 1989 Act in addition places a duty on local authorities to provide services designed-

(a) to minimise the effect on disabled children within their area of their disabilities; and
(b) to give such children the opportunity to lead lives which are as normal as possible.

Services which should be provided for children living with their families are set out in Part 1 Schedule 2 Paragraph 8 and includes 'home help'.

Children Act Guidance
2013 English guidance on the Children Act 1989[1] specifies binding timescales for assessments. At para 57 it states:

> The maximum timeframe for the assessment to conclude, such that it is possible to reach a decision on next steps, should be no longer than 45 working days from the point of referral. If, in discussion with a child and their family and other professionals, an assessment exceeds 45 working days the social worker should record the reasons for exceeding the time limit.

The timescale in Wales is detailed in 2001 guidance,[2] in which the maximum period is 35 working days (instead of the English 45 days) and the guidance notes that 'appropriate services should be provided whilst awaiting the completion' of the assessment.

[1] *Department for Education Working Together to Safeguard Children* (March 2013) p.30.
[2] National Assembly for Wales *Framework for the Assessment of Children in Need and their Families* (2001) para 3.11.

Chronically Sick and Disabled Persons Act 1970 (CSDPA 1970)

Section 2 of this Act places a specific duty on the local authority to provide for disabled people (among other things):

(a) practical assistance for that person in his home; and
(d) assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;

Where a disabled child appears to be in need of services under the 1970 Act there is a mandatory duty on local authorities,[3] to undertake an assessment[4] of the child's needs and to provide those services that are assessed as needed. The duty includes the provision of practical assistance in the home, home adaptations, and of equipment. Once services have been assessed as necessary, a local authority cannot avoid providing such services because of a lack of resources.[5]

The duty to facilitate adaptations under the 1970 Act is considered by the courts to be an extension to the Children Act 1989 duty on local authorities towards children in need. It follows that the timescales for the completion of assessments under the 1989 Act (noted above) apply with equal force to assessments under the 1970 Act.[6]

Housing, Construction and Regeneration Act 1996

The assessment and award of Disabled Facilities Grants (DFGs) are regulated by the Housing, Construction and Regeneration Act 1996. Section 34 of the 1996 Act requires housing authorities to approve or refuse applications as soon as reasonably practicable, and in any event not later than six months after the date of application. By section 36 the actual payment of the grant may be delayed until a date not more than 12 months following the date of the application. The time limit runs from the date of application and the Local Government Ombudsman (LGO) has held that in consequence housing authorities should not create inappropriate barriers to delay the assessment process.[7]

Practice Guidance to the 1996 Act

English Practice Guidance advises that housing authorities should prioritise applications for those in most need. The expectation is that the assessment and works are to be done 'as fast as possible'; the guidance also advises that interim solutions should be considered where delay is expected.[8] The guidance provides target timescales for the completion of the various stages of the DFG process and the LGO[9] has placed considerable reliance on these – eg that even for complex assessments, the time from an Occupational Therapy referral to the completion of his or her report should not exceed three months.[10]

In relation to people receiving hospital care, the guidance stresses that 'patients should not be discharged without either an adaptation in place or appropriate interim arrangements already in place' (para 5.24) and that it 'is not acceptable that the disabled person and carers should be left for a period of weeks or months without such interim help' (para 5.40) – a point that has been endorsed by the LGO.[11] The Ombudsman's concern about chronic delay and the importance of having reasonable time targets for the completion of works is also evidenced in a 2002 report in which it was stated that she did 'not accept that lack of resources is an acceptable reason for excessive delays in helping people whose needs have been clearly assessed and accepted' and that she 'would generally regard any delay beyond six months as unjustified'.[12] Likewise in a 2006 report[13] the ombudsman stated:

[3] Independent of their obligations under the Housing, Construction and Regeneration Act 1996.
[4] *R v Barnet ex p G* [2003] UKHL 57, [2003] 3 WLR 1194.
[5] see *R v Kirklees MBC ex p Daykin* (1997–98) 1 CCLR 512 at 525D.
[6] *R (Spink) v Wandsworth LBC* [2004] EWHC 2314 (Admin), [2005] 1 WLR 258.
[7] See for example, Complaint No 02/C/04897 Morpeth BC v Northumberland CC 27 November 2003.
[8] Delivering housing adaptation for disabled people; Good Practice Guidance 2006 para. 5.21.
[9] Complaint no 07/A/11108 against Surrey County Council 11 November 2008, para 10 and see eg Complaint no 06/C/16349 against Sheffield City Council 26 June 2008 para 46.
[10] Complaint no 07/A/11108 against Surrey County Council 11 November 2008.
[11] Complaint no 06/C/16349 against Sheffield City Council, 26 June 2008.
[12] Complaint nos 02/C/8679, 02/C/8681 and 02/C/10389 against Bolsover DC, 30 September 2003.
[13] Complaint no 05/B/00246 against Croydon LBC, 24 July 2006 para 37.

> It seems to me that eight months is an unreasonable length of time for a disabled person to have to wait for a request for adaptations to be properly assessed; and then to wait a further six months for the relatively minor adaptations recommended to be carried out . . . In my view, a process taking 14 months should have taken no longer than six months to complete.

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so called *Wednesbury* rule).[14] A decision will be unreasonable if it is, for example: (1) reached after ignoring relevant evidence; (2) involves unreasonable delay; or (3) pre-determined because the public body has a blanket policy that deals with the question.

Duty to make decisions on the basis of the relevant evidence

Public bodies must take into account all relevant considerations before making decisions and must ignore the irrelevant. Where the practical evidence is 'largely one way' (eg in this case, the urgency and the need for suitable interim arrangements) then absent unusual facts, the public body must accept (and act in accordance with) that evidence.

Duty to act without delay

Where a statutory provision provides no timescale for the discharge of an obligation, the courts require that it should be done 'within a reasonable period'.[15] What constitutes a 'reasonable time' is a question of fact, depending on the nature of the obligation.[16] In *R (Bernard) v Enfield LBC:* (2002)[17] for example, it was held that a delay in undertaking adaptations to a home could violate article 8 of the European Convention on Human Rights (the right to respect for family life and home).

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*[18] 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.[19]

Analysis: Application of the Law to the Facts

Arthur is a disabled child for the purposes of the Children Act 1989 and accordingly a child 'in need' for the purposes of s17 of that Act. He is also a disabled person for the purposes of the Chronically Sick and Disabled Persons Act 1970, section 2 and the Housing, Construction and Regeneration Act 1996.

Duty to assess within a reasonable time

The local authority has duties under three separate Acts to facilitate the provision of disabled facilities and adaptations in Arthur's home: the Children Act 1989; the Chronically Sick and Disabled Persons Act 1970; and the Housing, Construction and Regeneration Act 1996.

Public law principles require that the obligations under these Acts should be addressed 'within a reasonable period' – and that what constitutes a 'reasonable time' depends upon the circumstances.

The binding guidance to the 1989 Act requires assessments to be completed within a maximum of 45 working days in England (35 in Wales) and as noted above the LGO has held that that even for complex assessments, the timescale should not exceed three months.

It follows that the local authority statement that it would be at least six months for an assessment is in breach of the above requirements and accordingly unlawful.

What constitutes a reasonable period will of course depend upon the facts of the case: not only the specific need (in this case that of a young disabled child who needs tube feeding at night) but also the complexity of the

[14] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

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

[16] ibid.

[17] [2002] EWHC 2282.

[18] [1983] 2 AC 613, HL.

[19] 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.

work required and the suitability of interim arrangements. What a local authority is not permitted to do in such cases is to have a 'blanket' policy requiring a standard delay for everyone: it must (as the guidance requires) prioritise applications for those in most need. The evidence supplied in this case suggests that the authority is delaying all applications and accordingly this constitutes a fettering of its duty / discretion and again would appear to constitute maladministration.

The provision of the disabled facilities and adaptations within a reasonable period

The above analysis in relation to the delay in the assessment of the need for the disabled facilities and adaptations applies with equal force to the actual work to provide this support. The evidence supplied is that the local authority has a policy that requires people identified as in need of such assistance to wait even longer than six months (from the assessment) for the works to be completed.

The length of the delay and the nature of this 'blanket' policy would appear – for the reasons given above – to constitute maladministration.

The provision of interim support

As noted above, the importance of making suitable interim arrangements for people waiting for the provision of disabled facilities and adaptations is stressed by the guidance to the 1996 Act and has been emphasised by the LGO.

The evidence supplied in this case is that the interim arrangement proposed by the authority is that Arthur's mother sleeps with him on the floor. On the face of it, this would appear to be the most minimal arrangement that could be made: to constitute not an 'interim arrangement', but a statement of 'bare necessity'. It is not usual for a parent / child to be required to sleep on the floor and it is not usual for a parent to be required to sleep with their 3 year old child – particularly (it would appear) if the child has severe impairments and requires tube feeding. Given the apparent inadequacies of this proposed arrangement the stated timescales for remedying the situation by providing the required facilities and adaptations would appear to be all the more unreasonable.

Given the failings by the authority and the lack of interim arrangements, it is not impossible that a court might consider its actions sufficiently serious to violate the authority's obligations under article 8 of the European Convention on Human Rights.[20]

Actions that must be taken

The local government ombudsman has issued detailed information and practice guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[21] 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 should 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'.[22] It would appear to follow that:

1. in the first instance, a suitable (ie carefully thought through) interim arrangement should be facilitated with the utmost urgency;
2. an assessment for a DFG under the Housing Construction and Regeneration Act 1998, and an assessment under the Chronically Sick and Disabled Persons Act 1970 section 2 should be commenced and completed without delay (we would suggest that it should commence within 5 working days of being so requested by the family and completed within 35 working days)
3. the authority should consider compensating the family for the general inconvenience and distress caused by the maladministration that appears to have characterised its actions in this case.

[20] As was the case in *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (considered above).
[21] LGO (2005) Guidance on Good Practice 6: Remedies.
[22] LGO Guidance p3.

ROSI'S STORY

Main topic: *The right of a divorced non-resident parent to have adaptations to their home to enable contact visits by their disabled daughter.*

Rosi is 10 and has Cerebral Palsy. Her parents have separated, and before this occurred her home was fully adapted to meet her needs, with the benefit of a Disabled Facilities Grant (DFG). Rosi's father is now living in a separate home and in order that Rosi can have Contact with him, this home also requires adaptations. DFG's can, however, only be paid for a 'main' residence.

Summary of Facts

This advice concerns Rosi, a 10 year old child with Cerebral Palsy. Her parents have separated, and are not currently seeking a court order to determine residence or contact arrangements. Prior to the parents' separation, the family already received a DFG for the main residence where the mother now resides, and all necessary adaptations have been made. The father is keen to maintain a close relationship with Rosi and, to this end, seeks adaptations to his new residence to enable his daughter to visit.

The Relevant Legal Issues

The follow issues are considered in this advice:

1) whether funding is available for a second residence under the Housing, Construction and Regeneration Act 1996; and
2) whether there is a subsequent duty under the Chronically Sick and Disabled Persons Act 1970 to provide the necessary adaptations to a second residence.

Children Act 1989

For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'. This definition is also the definition of a disabled person for the purposes of the Chronically Sick and Disabled Persons Act 1970 and the Housing, Construction and Regeneration Act 1996 (considered below).

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families. In pursuance of this requirement, the Act places a duty on local authorities to provide a 'range and level of services appropriate to those children's needs' – which could include, for example, the provision of adaptations, fixtures and fittings for a home.

Schedule 2 Part 1 para 6 of the 1989 Act in addition places a duty on local authorities to provide services designed-

(a) to minimise the effect on disabled children within their area of their disabilities; and
(b) to give such children the opportunity to lead lives which are as normal as possible.

Chronically Sick and Disabled Persons Act 1970 (CSDPA 1970)

Section 2 of this Act places a specific duty on the local authority to provide for disabled people (among other things):

(b) practical assistance for that person in his home; and
(d) assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;

Where a disabled child appears to be in need of services under the 1970 Act there is a mandatory duty on local authorities,[23] to undertake an assessment[24] of the child's needs and to provide those services that are assessed as needed. The duty includes the provision of practical assistance in the home, home adaptations, and of equipment. The duty to facilitate adaptations under the 1970 Act is considered by the courts to be an extension to the Children Act 1989 duty on local authorities towards children in need.

[23] Independent of their obligations under the Housing, Construction and Regeneration Act 1996.
[24] *R v Barnet ex p G* [2003] UKHL 57, [2003] 3 WLR 1194.

Housing, Construction and Regeneration Act 1996

In general terms, a DFG is a grant which is available to persons who are assessed as having a disability according to the above definition. Such persons are able to access an assessment for this grant via their local housing authority.

Under the Housing, Construction and Regeneration Act 1996, a DFG can only be granted for the main residence and so where parents are separated, it may be necessary to establish eligibility for adaptations to the second home, under separate legislation – most obviously under the Children Act 1989 section 17 or the Chronically Sick and Disabled Persons Act 1970 (as above).

Relevant Human Rights provisions

Guidance concerning the operation of the DFG grant process[25] places emphasis on the importance of authorities having regard to the demands of the social model of disability – which in this context requires (so far as reasonably practicable) that barriers in the physical environment or the attitudes within society should be removed so as to enable the participation of the disabled person in society on an equal basis with others. This advice is reinforced by the obligations created by Article 19 UN Convention on the Rights of Persons with Disabilities (the right to full inclusion and participation in the community).[26] This is further supported by Article 9 of the UN Convention on the Rights of the Child 1990 (the right of the child to maintain personal relations and direct contact with a separated parent).

A failure to take action to maintain effective contact may constitute a breach of the individual's rights under Article 8 of the European Convention on Human Rights (ECHR) which may require the provision of adaptations to a person's home.[27]

Equality Act 2010

The Equality Act 2010 section 19 makes unlawful indirect discrimination – namely discrimination that arises (among 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.'[28] While the practice of denying adaptations to a second residence would appear to be neutral in application to all disabled children, the child whose parents are separated would be put at a particular disadvantage in comparison with a disabled child whose parents live together because the disabled child's ability to access the separated parent's home may be substantially impaired.

It is widely recognised that male partners are most likely to move out of the main residence upon separation, due to existing child care arrangements.[29] In such cases, the mother is able to make full use of the provision of adaptations to the main residence whilst the father, by virtue of living in the second residence, does not have access to such provision. As has already been suggested this may have significant implications for his ability to gain shared residence or private contact time with his child simply because the built environment in which he now lives is inaccessible to his child. This has the potential to put him at a particular disadvantage as against other comparator groups, namely fathers of disabled children who still reside in the main residence and fathers of non-disabled children who, although being separated, still have the opportunity for regular contact, by virtue of the fact that their able-bodied children can access both homes as and when they so choose.

Although public authorities are not usually bound to make provision in order to facilitate the realisation of a residence order granted by the court, the exceptional nature of the needs of a disabled child has received judicial recognition[30] and it has been asserted that this should constitute a weighty consideration in the decision concerning the allocation of appropriate provision where parents are living in separate residences.

[25] Department of Communities and Local Government/ Department for Education/ Department of Health, Delivering Housing Adaptations for Disabled People: A good Practice Guide, 2006, para 1.6.

[26] Ratified by the United Kingdom on 7 August 2009 and by the European Union on 23 December 2010: see (for example) *Burnip v. Birmingham City Council* [2012] EWCA Civ 629.

[27] *R (Bernard) v Enfield LBC* (2002) EWHC 2282.

[28] 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.

[29] See *Eweida v BA plc* [2010] EWCA Civ 80 which confirms that there is no need to make reference to statistics to demonstrate comparative disadvantage.

[30] See *Holmes-Moorhouse v London Borough of Richmond upon Thames* [2009] UKHL 7 Lord Hoffman at para 21.

Preliminary Conclusions

As the law currently stands, it is unlikely that DFG funding would be available for Rosi's father's residence under the Housing Construction and Regeneration Act 1996.

The local authority has however the power / duty to fund adaptations to the second residence under the Chronically Sick and Disabled Persons Act 1970, section 2 (and the relevant provisions of the Children Act 1989). In determining the importance of this support, the authority would have to have regard to a number of factors – not least that without this support Rosi may be prevented from participating in society on an equal basis with other children as the lack of adaptations may prevent access to her father's home.

In order to determine the extent of the harm in such a case, the local authority would be required to undertake a full assessment of Rosi's needs for this support and to provide a reasoned determination as to her eligibility for such support.

DOMINIC'S STORY

Main topics: *Refusal to pay Direct Payments. Refusal to meet manifest need for respite care.*

Also considered: *Parent carers' assessments*

Dominic is 4 and has an Autistic Spectrum Disorder and a number of other severe impairments. He has 1:1 support in school. Due to increasing behaviour and sleep management difficulties his parents have requested additional respite support (as a direct payment) from the local authority.

The local authority has refused to provide support to meet the increased needs on the basis that Dominic does not meet the criteria for support for direct payments or short breaks; that his needs are comparable and little different to those of any four - year old child; and that Dominic's mother would be unable to manage direct payments in any event.

Summary of Facts

This advice concerns Dominic, a four-year-old boy who has been diagnosed with Autistic Spectrum Disorder. Dominic has three siblings aged two, nine and 11. Dominic is incontinent, lacks safety awareness, wears a safety helmet, uses a wheelchair, needs help to communicate and has a condition which affects his balance and muscle control. He has 1:1 support in school, but is having increasing issues with behaviour and sleep which is causing disruption during the night to his parents and siblings. His parents are exhausted and this is limiting their capacity to support Dominic and their other three children.

Dominic's needs have been assessed by the local authority children's services' team (with the benefit of an Occupational Therapist report) in relation to his parent's request for support: they are seeking direct payments to provide respite care to enable them to manage Dominic's needs and spend more quality time with his siblings. As a result of the assessment (entitled an 'Assessment and Analysis') the local authority rejected the request for direct payments on three grounds, namely:

a) Dominic does not meet the criteria for support from direct payments or short breaks as any four year old child typically requires 'monitoring and support in care skills';
b) During the assessment process, Dominic's mother did not indicate that Dominic has any difficult behaviour that could not be associated with another child of his age, other than sleeping problems, for which direct payments are an inappropriate response; and
c) Dominic's mother does not have time to manage direct payments.

Materially the 'Assessment and Analysis' report states that:

- Dominic 'is incontinent and wears nappies at all times';
- 'direct payments cannot be used as childcare facilities';
- (in the context of the use of direct payments and the mother's desire for flexibility) that the use of the payments had 'to be regular as they would act as employee [sic] and the employer [sic] would need to know what hours they would be working';
- 'mum did not raise anything that stands out as difficult behaviour that could not be associated with another child of his age, other than the sleeping issue. However, direct payments could not provide support to deal with this issue …'.

- 'mum does not have the time to manage direct payments' .. 'Direct payments require the mum to act as an employee [sic] and deal with paperwork but also engage well with services, and attend regular Child in Need meetings'.

The report concludes that:

- whilst the mother is 'struggling' and this must be 'a very stressful situation' and it is 'undeniable that this family are under stress and need support implemented as soon as possible' Dominic nevertheless does not 'meet the criteria for support from direct payments or short breaks at this time'.

The reasons given for the report's conclusions are that Dominic's 'difficulties lie in delayed learning and social and communication difficulties and these are things that the school report is progressing in'.

The authority also had before it a report from its Occupational Therapist (OT) which identified a number of needs, including those arising out of his disturbed sleeping problems which were 'atypical to a typical four - year old', as well as:

- muscle control difficulties which cause difficulty in sitting for any length of time, tiredness and a fluctuating ability to mobilise safely, leading to a requirement for adult assistance with mobilisation;
- A lack of safety awareness for which Dominic requires adult supervision at all times;
- Sensory difficulties which impact on his behaviour as he has a need to move frequently;
- Difficulties in communication for which he needs assistance;
- Incontinence.

The OT report makes clear that Dominic requires full assistance with all self-care above the level expected for a two-year old child due to physical and communication needs, and that his difficulties mean that he requires more time and skills from his parents than would be expected for a typically-developing four-year old. The report contains an explicit statement (on two separate occasions) that Dominic's needs are significantly greater than those of a typical four-year old child. The report concludes that his parents care for him 'and want to help him but are limited in their capacity to do so due to exhaustion and lack of understanding of his needs at this time … ' and recommends that … 'respite care is provided for [Dominic] to allow parents to sleep and rest recuperate'.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989

Section 17 of the Children Act 1989 imposes a general duty on local authorities to provide services which promote the welfare of children in need, including the upbringing of such children by their families.[31] Disabled children are included in the definition of children in need.[32] The 1989 Act enables a local authority to provide services to the family of the child in need, or to any family member if 'it is provided with a view to safeguarding and promoting' the welfare of the child in need.[33]

Paragraph 6 of Schedule 2 of the Children Act 1989 imposes a duty on local authorities to provide services which 'assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring'.[34]

Section 17A of the 1989 Act (in combination with the relevant regulations[35]) places a duty on local authorities to make direct payments to the parents of a disabled child to meet their child's assessed needs subject to it being satisfied that the disabled child's welfare 'will be safeguarded and promoted by securing the provision of it by the means of the direct payment'.[36] It has been suggested that if a local authority considers that direct payments are not suitable in a particular case, it is 'obliged to provide cogent reasons for its opinion'.[37]

[31] Children Act 1989 s17(1).
[32] Children Act 1989 s17(10)(c). Under s17(11) a child is considered disabled if (among other things) he or she 'suffers from mental disorder of any kind'.
[33] Children Act 1989, s17(3)
[34] Children Act 1989 Schedule 2 Paragraph 6(1)(c)
[35] The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI 1887 and The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 SI No 831 (W125).
[36] English Regulations reg 7(2); Welsh Regulations reg 8(2).
[37] Clements, L and Thompson, P *Community Care and the Law* 5th edition (Legal Action 2011) para 12.30.

Guidance concerning the provision of direct payments[38] advises that local authorities should provide practical support to recipients of direct payments, including:[39]

- support and advice in setting up and maintaining a direct payment scheme, including financial management;
- support and advice about the legal responsibilities of being an employer;
- support and advice about being a good manager of staff;
- information about income tax and National Insurance;

Statutory Guidance

Binding guidance has been issued to local authorities in England and Wales in relation to the Children Act 1989 assessment process.[40] The guidance together with court and ombudsmen findings stipulate that an assessment should result in a plan of action for the child and their family, which should set out what services are to be delivered, and what actions are to be undertaken, by whom and for what purpose.[41] The guidance also provides that services to support the child and their family should be commissioned prior to the conclusion of the assessment where particular needs are identified and/or that in certain circumstances a quick assessment is required.[42]

Chronically Sick and Disabled Persons Act 1970

Section 2 of the Chronically Sick and Disabled Persons Act 1970 obliges a local authority to provide (among other things) practical assistance in a disabled person's home (eg a sitting service, a home help, a night sitting service). The principles of public law and departmental guidance demand that there must be a rational and transparent process for deciding whether a disabled child is eligible for services.[43]

The Carers Acts

People with parental responsibility for a disabled child who are providing a substantial amount of care to the child on a regular basis are entitled to an assessment under the Carers (Recognition and Services) Act 1995, section 1(2) and the Carers and Disabled Children Act 2000, section 6. Any such assessment must consider the sustainability of the caring relationship and the ability of the carer to continue to provide care;[44] whether a parent carer of a disabled child requires support and, if so, what their support needs are;[45] and consideration of the carer's work, education, training and leisure needs.[46]

Where a local authority is undertaking an assessment of a disabled child and it appears that an individual may be entitled to request (but has not requested) a carer's assessment, the authority must inform the individual that she / he has a right to such an assessment (section 1(2B) of the 1995 Act).

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)[47]). 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 – eg 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;[48] and (2) the UN Convention on the Rights of Persons with Disabilities

[38] Department of Health (2009) *Guidance on direct payments for community care, services for carers and children's services England and Welsh Assembly Government* (2011) *Direct Payments Guidance Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Guidance*.

[39] Ibid para 37 of the English Guidance and paras 2.6 – 2.12 of the Welsh Guidance.

[40] In England Department for Education *Working Together to Safeguard Children*, (HM Government 2013) and in Wales as Welsh Assembly The Framework for the assessment of children in need and their families (TSO, 2001) both issued under s7 of the Local Authority Social Services Act 1970.

[41] See for example, *Working Together to Safeguard Children* (ibid) para 50; R (J) v Caerphilly CBC [2005] EWHC 586 (Admin); and Local Government Ombudsman complaint number 13 002 982 against Birmingham City Council 12 March 2014.

[42] *Working Together to Safeguard Children* (ibid) para 58 and Welsh Assembly The Framework for the assessment of children in need and their families (TSO, 2001) paras 1.55 & 3.11.

[43] Department for Children, Schools and Families, Aiming high for disabled children: core offer, 2008.

[44] Section 1 of the Carers (Recognition and Services) Act 1995 states that the assessment must assess the carer's 'ability to provide and continue to provide care' for the person he or she cares for.

[45] Children Act 1989 s17ZD

[46] Section 2 Carers (Equal Opportunities) Act 2004

[47] 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 Re C (A Child) [2014] EWCA (Civ Div).

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

– and in particular Article 19 which requires (among other things) the provisions 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'.[49]

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so - called *Wednesbury* rule).[50] A decision will be unreasonable if it is, for example: (1) reached after ignoring relevant evidence; (2) pre-determined because the public body has a blanket policy that deals with the question; (3) irrational – for example it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.[51] Public law also requires that in appropriate situations, reasons should be given for a particular decision.

Duty to make decisions on the basis of the relevant evidence

Public bodies must take into account all relevant considerations before making decisions and must ignore the irrelevant. Where the practical evidence is 'largely one way' then absent unusual facts, the decision must be in accordance with that evidence.[52] The practical evidence for social care assessments comes from the social services' employee undertaking an assessment, listening to the disabled person and his or her carers and considering the other relevant evidence (eg medical / OT reports). It is this assessment, based on all the relevant information that is the practical evidence on which the decision should be based. In a number of cases the Courts and Ombudsmen as well as the Joint Committee on Human Rights have questioned the legality of 'panels'' that overrule social work recommendations, the basis for this concern being that the panel is not making a decision 'in accordance with the evidence'.[53]

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* (1988)[54] 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.

Duty to give reasons

Although there is no general duty on public bodies to give reasons for their decisions, 'reasonableness' will require that they do give reasons where the interests of justice require. In such cases the reasons need not necessarily 'be elaborate nor lengthy. But they should be such as to tell the parties in broad terms why the decision was reached.'[55] In an analogous social care assessment case[56] the Court of Appeal held that the common law (and 'fairness') required that the council explain how it had reached its decision. The reasons must not only be clear – they must be lawful and given in a timely way so that the individual concerned is able to exercise their right to seek a review of that decision.

Analysis: Application of the Law to the Facts

For convenience, this section is separated into the following sections:

A. The decision not to provide direct payments
B. The failure to undertake a carer's assessment

A. The decision not to provide direct payments / short breaks

The local authority advances three reasons for its decision to refuse direct payments:

[49] See for example *Burnip v. Birmingham City Council and Gorry v. Wiltshire County Council* [2012] EWCA Civ 629, at para 20.

[50] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[51] See for example *R0020(South Tyneside Care Home Owners Association & Ors) v South Tyneside Council* [2013] EWHC 1827.

[52] *R v Avon CC ex p M* (1999) 2 CCLR 185, QBD.

[53] For a detailed commentary on these decisions / reports see Luke Clements and Pauline Thompson *Community Care & the Law*, (5th edn, Legal Action Group 2011) para 3.188 – 3.191 which can be accessed at www.lukeclements.co.uk/resources-index/files/PDF%2008.pdf

[54] [1988] 3 WLR 113, CA.

[55] *Stefan v The General Medical Council (Medical Act 1983)* [1999] UKPC 10 at para 32.

[56] *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209.

a) Dominic does not meet the criteria for support for direct payments or short breaks (the *'failing to meet the criteria'* ground);
b) Dominic's needs are comparable and little different to those of any four - year old child (the *'ordinary four - year old'* ground);
c) Dominic's mother would be unable to manage direct payments (the *'unable to manage'* ground).

a) The 'failing to meet the criteria' ground

The local authority has (on the basis of the papers we have seen) failed to explain what the relevant 'criteria' are for establishing whether or not a need exists for support services under the CA 1989 section 17, and CSDPA 1970, section 2. These statutory duties are predicated on the authority being satisfied that it is necessary to provide support. The authority suggests that the criteria include consideration as to whether a child's needs are distinguishable from those of other children of the same age, and this aspect is considered below. However in addition the authority gives as its reasons, that:

- 'direct payments cannot be used as childcare facilities'; and
- direct payments are not appropriate for a need that arises out of sleeping problems (in this case the need of Dominic's parents and his siblings to have some undisturbed sleep).

The local authority is mistaken in relation to both of these reasons. The direct payments legislation requires authorities to make direct payments in relation to any assessed need of a disabled child under section 17 of the 1989 Act and section 2 of the 1970 Act – subject to limited statutory exceptions – which do not include an exception for 'childcare facilities' or needs arising out of 'sleeping problems'. Classically, support under section 2(1)(a) of the 1970 Act – such as the provision of a care assistant to provide additional home support and a night - sitting service – would be considered as capable of addressing these needs (and for which direct payments must be available). For a local authority to have a local policy excluding (for example) direct payments for childcare facilities would amount to a misunderstanding of the law and a fettering of its statutory duties.

b) The 'ordinary four - year old' ground

The 'Assessment and Analysis' report in this case provides as a reason for refusing support the fact that Dominic's needs are little different to those of other children of his age. Whilst this assertion does not appear to be supported by the evidence, the reason is in itself at variance with the law. In determining whether a disabled child needs support under section 17 CA 1989 a local authority must not focus solely on the child – but must look at the entire family and the environment in which the family operates:[57] the stresses and strains on the parents and their other obligations, including their ability to cope and to care for their other children (eg as the report notes - Dominic's mother is 'struggling' in 'a very stressful situation' and that it is 'undeniable that this family are under stress and need support implemented as soon as possible').

The evidence available to the local authority would appear incapable at law of supporting the finding that Dominic's needs are little different to those of any other child of his age. The 'Assessment and Analysis' report itself notes that:

- Dominic 'is incontinent and wears nappies at all times';
- Dominic has disturbed sleep that has a severe impact on the rest of the family.

The OT report identifies a number of needs – in addition to his sleeping problems – which are wholly different from a typical four - year old, including:

- muscle control difficulties which cause difficulty in sitting for any length of time, tiredness and a fluctuating ability to mobilise safely, leading to a requirement for adult assistance with mobilisation;
- A lack of safety awareness for which Dominic requires adult supervision at all times;
- Sensory difficulties which impact on his behaviour as he has a need to move frequently;
- Difficulties in communication for which he needs assistance;
- Incontinence.

The OT report makes clear that Dominic requires full assistance with all self-care above the level expected for a two-year old child due to physical and communication needs, and that his difficulties mean that he requires additional time and skills from his parents than would be expected for a typically-developing four-year old. The report states that the parents are limited in their capacity to care for Dominic, largely because of exhaustion, and recommends that respite care is provided.

[57] See for example Department for Education *Working Together to Safeguard Children*, (HM Government 2013) para 32 and Welsh Assembly The Framework for the assessment of children in need and their families (TSO, 2001) para 1.23, 1.38 etc.

The authority is also aware that Dominic requires a helmet, foot orthotics and a wheelchair and 1:1 support at school.

Based on the above information and the OT's recommendation that respite care should be provided to the parents, the decision not to identify an eligible need for (and entitlement to) direct payments / short breaks would appear, on the evidence provided, to be irrational – as one wholly unsupported by the facts.

The decision to refuse support because Dominic's 'difficulties lie in delayed learning and social and communication difficulties and these are things that school report is progressing in' would also appear to be irrational: the fact that some of a child's profound impairments are being addressed in an educational setting does not mean that social services have no responsibility for meeting his family's social care support needs.

c) The 'unable to manage' ground

A reason advanced for refusing a direct payment to the family appears to be based on the inability of Dominic's mother to organise direct payments and act as an employer of personal assistants. The relevant authority statement is:

> 'mum does not have the time to manage direct payments' ... 'Direct payments require the mum to act as an [employer] and deal with paperwork but also engage well with services, and attend regular Child in Need meetings'.

The 'Assessment and Analysis' report also states that to qualify for direct payments the payments have 'to be regular as they would act as [employer] and the [employee] would need to know what hours they would be working'.

As a matter of law, direct payments do not require the recipient to act as an employer – they can, for example be used to pay an agency, or a self-employed carer. The law does not require the payments to be regular nor does it require the carer to be able to manage the payments 'alone': the legislation provides for carers to have 'assistance' in managing payments[58] and (as noted above) the relevant guidance requires local authorities to put in place such assistance. It does not appear that the social work team has considered the relevant guidance and the support that might be available from local services or networks (such as advocacy services or independent living centres) or to have recommended these, or fully explained the purpose and possible uses of direct payments to Dominic's mother. The authority (it appears) has also failed to consider whether Dominic's mother will be able to manage the payments once she has the care for which she has requested the payments. While a local authority is required to consider whether a person is able to manage direct payments, in the light of these omissions, it appears that the local authority has again failed to consider all the relevant information, most particularly the guidance. This failure to consider all relevant information means that the decision is, without clear evidence to the contrary, in public law terms, unreasonable.

B. The need for a carer's assessment

Dominic's main parental carer is his mother. The social worker's assessment of Dominic's needs makes various references to the difficulties his mother is having, both in understanding and in meeting Dominic's needs. The assessment states that family relationships appear fraught and that the family is under stress, and recommends parenting courses and intensive support team involvement. It is clear from the OT report that a main cause of the parents' difficulties is lack of sleep, which is limiting their capacity to grasp and to manage Dominic's needs.

Despite this, the documentation we have received suggests that no formal carer's assessment has been offered to Dominic's mother, or undertaken. Given the legal duty (identified above) on the local authority to advise her of her right to such an assessment and the authority's awareness of the difficulties, the apparent omission – without explanation – amounts to a breach of statutory duty / maladministration.

Preliminary Conclusions

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

1. The local authority has failed to consider all the relevant facts and issues in relation to Dominic's needs, and as such the decision that his parents are not eligible to receive direct payments is unreasonable and unlawful;

[58] The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI 1887 reg 4(a) and The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 SI No 831 (W125) reg 5(b).

2. The failure of the local authority to conduct a carer's assessment in relation to Dominic's parents or to alert them to their right to request such an assessment is unlawful.

Actions that must be taken

Given the above analysis, there are strong grounds for requiring that:

1. the local authority should, without delay, conduct a re-assessment of Dominic's needs in the light of the information in the OT report (we would suggest within 10 working days of being requested by Dominic's parents);

2. in the light of the urgency of the parents' situation, the local authority should provide immediate respite support to Dominic's parents, pending the outcome of the reassessment;

3. following the reassessment, the local authority should reconsider its decision that Dominic's parents are not entitled to direct payments or short term breaks, taking into account any local support structures available to the parents in managing direct payments;

4. if the authority's decision remains that Dominic's parents are not entitled to direct payments or short term breaks, a full explanation for the reasons for this decision should be provided to Dominic's parents, together with information on the appeals/ complaints process;

5. The local authority should immediately offer Dominic's parents carers' assessments and, if requested, conduct these expeditiously (we would suggest within 15 working days of being requested).

FRED'S STORY

Main topics: *Reduction in a care package*
A policy of not paying for 'childcare' for 'stay – at - home mothers'

Also considered: *Parent carers' assessments*
Discrimination contrary to the Equality Act 2010

Fred is a 9 - year old boy with Spastic Quadriplegic Cerebral Palsy, a statement of Special Educational Needs and in need of one-to-one support at all times. Fred's mother is his primary carer. A reassessment of Fred's needs for care and support resulted in the package being reduced, even though his needs had not decreased.

Summary of Facts

This advice concerns Fred, a nine year old boy with a diagnosis of Spastic Quadriplegic Cerebral Palsy who also presents with delay in his speech and communication. Fred has a statement of Special Educational Needs (SEN), attends a specialist educational establishment for children with Cerebral Palsy and receives one-to-one support at all times. Fred's mother is his primary carer. Fred's parents seek an increase in direct payments in response to his complex and evolving condition and the increasing demands this places on the family.

Fred's sleeping pattern can be disrupted as a result of poor sound insulation at the family home and therefore lack of sleep is an issue for the family. When Fred's routine changes or he is tired, he can demonstrate challenging behaviour such as screaming, crying or trying to scratch someone near to him as a sign of anxiety.

The family received direct payments to cover 8 hours per week as a result of his core assessment. The direct payments were used in order for Fred to access activities – primarily respite care support. Fred's parents considered that in the school holidays the support they received was insufficient to sustain their caring role and sought an increase in Fred's care package. The pressing need for an increase in the support he received was explained to Fred's social worker during a home visit in January 2014. However the outcome of the reassessment was that the social worker recommended a reduction from 8 hours to 5 hours per week, contrary to what she had indicated during the visit. Fred's mother shared the social worker's reassessment with Fred's Head Teacher and a Senior Occupational Therapist and both responded with statements that Fred's needs were significantly greater than described in the assessment: that in their opinion the assessment failed to reflect the extent of his needs. These statements were forwarded to the local authority to support the mother's challenge to the assessment.

The local authority rejected the challenge and its only explanation for so deciding was that it did not 'fund childcare': that Fred's mother was 'a stay - at - home

mother and would receive ample respite when Fred attends school'.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989
For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families.

Schedule 2 Part 1 para 6 of the 1989 Act (Provision for disabled children) in addition places a duty on local authorities to provide services designed-

(a) to minimise the effect on disabled children within their area of their disabilities;
(b) to give such children the opportunity to lead lives which are as normal as possible; and
(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

Services which should be provided for children living with their families are set out in Part 1 Schedule 2 Paragraph 8 and includes 'home help'.

In *R v Barnet ex p G* (2003)[59] the House of Lords held that local authorities are under a duty to assess the needs of such children.

Statutory Guidance to Children Act
Statutory guidance in England[60] and in Wales[61] reminds local authorities that they are under a duty to share, check and discuss information with families; to record differences in opinion and disagreements so as to enable corrections to be made where appropriate.

Chronically Sick and Disabled Persons Act 1970
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. Services under Section 2 of the 1970 Act include the provision of 'practical assistance in the home' e.g. respite care such as a sitting service and / or the provision of recreational and educational facilities.

The Carers Acts
People who are providing regular and substantial care for a disabled child are entitled to a 'carer's assessment' under the Carers (Recognition and Services) Act 1995, section 1(2) and/or the Carers and Disabled Children Act 2000, section 6. The duty is owed to any such carer (including those with parental responsibility for a disabled child). Carers' assessments must consider, among other things: the sustainability of the caring relationship; the ability of the carer to continue to provide care;[62] the carer's support needs;[63] and consideration of the carer's work, education, training and leisure needs.[64]

Health and Social Care Act 2001
Direct payments enable individuals to purchase assistance or services that local authorities would otherwise provide or commission. Direct payments have a number of advantages for some individuals – in that they can give them greater control and flexibility over their care and support arrangements – which can in turn increase their opportunities for independence, social inclusion and enhanced self-esteem.

Local authorities are required to offer direct payments to the parents of disabled children instead of providing services, subject to the following factors:

1. The direct payment relates to a social services assessment of an 'eligible need';
2. The local authority is satisfied that the person's needs for the relevant service can be met by the making of a direct payment and (in the case of a disabled child) that it will also 'safeguard and promote' the welfare of the child;

[59] [2003] UKHL 57, [2003] 3 WLR 1194.
[60] Department for Education *Working together to safeguard children* (2013) para 34.
[61] Welsh Assembly, Framework for assessing children in need and their families, TSO, 2001, para 3.13.
[62] Carers (Recognition and Services) Act 1995 section 1
[63] Children Act 1989 s 17 ZD
[64] Section 2 of the Carers (Equal Opportunities) Act 2004.

3. The recipient of the direct payment (i.e. the disabled person if aged 16 or over or a person with parental responsibility for the disabled child) must be capable of managing the direct payments monies 'alone or with assistance';
4. The direct payment must be enough to purchase services to meet the disabled person's assessed needs.

The Equality Act 2010

The Equality Act 2010 section 149 imposes duties on public authorities to take action aimed at eliminating discrimination, advancing equality of opportunity and fostering good relations. This is often referred to as the 'public sector equality duty' (PSED) and it has been the subject of extensive litigation. The obligation relates to persons who share a protected characteristic – which include sex and disability.

Section 13 of the 2010 Act makes it unlawful to discriminate directly against people by treating them less favourably by virtue of a protected characteristic. Section 13 in addition prohibits associative discrimination – eg treating a person less favourably because of their association with a disabled person.[65]

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so - called *Wednesbury* rule).[66] A decision will be unreasonable if it is, for example: (1) based on irrelevant evidence; (2) reached after ignoring relevant evidence; (3) pre-determined because the public body has a blanket policy that deals with the question; (4) irrational – for example it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.[67]

Duty to make decisions on the basis of the relevant evidence

Public bodies must take into account all relevant considerations (and ignore irrelevant considerations) when making decisions. Where the practical evidence is 'largely one way' then absent unusual facts, the decision must be in accordance with that evidence.[68] The practical evidence for social care assessments comes from the social services employee undertaking an assessment, listening to the disabled person, his or her carers and considering the other relevant evidence (eg the child's teacher and occupational therapist).

Duty to Give Reasons

Although there is no general duty on public bodies to give reasons for their decisions, 'reasonableness' will require that they do give reasons where the interests of justice require. In such cases the reasons need not necessarily 'be elaborate nor lengthy, but they should be sufficient to enable a person to understand in broad terms why the decision was reached.'[69] In an analogous social care assessment case[70] the Court of Appeal held that the common law (and 'fairness') required that the council explain how it had reached its decision. The reasons must not only be clear – they must be lawful and given in a timely way so that the individual concerned is able to exercise their right to seek a review of that decision.

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* (1988)[71] 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.

Relevant case law and Local Government Ombudsman (LGO) reports

Birmingham CC ex p Killigrew (2000)[72]

This case concerned a challenge to a local authority decision to reduce the care package of a disabled person where no evidence had been provided by the local authority to demonstrate that her impairments had diminished or her ability to live without care and services had increased. The court held that the local authority could not reduce the care package without compliance with relevant and detailed Department of Health guidance

[65] See for example *Coleman v Attridge Law* 2008 (C-303/06

[66] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[67] See for example *R0020(South Tyneside Care Home Owners Association & Ors) v South Tyneside Council* [2013] EWHC 1827.

[68] *R v Avon CC ex p M* (1999) 2 CCLR 185, QBD.

[69] *Stefan v The General Medical Council (Medical Act 1983)* [1999] UKPC 10 at para 32.

[70] *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209.

[71] [1988] 3 WLR 113, CA.

[72] 3 CCLR 109.

which in its view required: (1) detailed and convincing reasons as to why the previous support was no longer required; and (2) up-to-date evidence – which the local authority had failed to obtain.

LGO Report concerning Thurrock Council (2013)[73]
The complaint concerned a local authority assessment which had identified a need of 10½ hours support for a disabled parent which was then reduced by a 'resource panel'[74] to 6 hours 'based on other cases and the funding provided by Children's Services'. The Ombudsman found this to be maladministration as no evidence or satisfactory reasons had been provided for the reduction.

LGO Report concerning Lambeth Council (2012)[75]
The LGO held that where a local authority is providing care services (such as respite care), then the presumption is that it should continue to provide this level of care until such time as the authority undertakes a new assessment and provides a revised care plan indicating that a different / less care support is required. In the absence of such action any reduction in support by the council may constitute maladministration.

Analysis: Application of the Law to the Facts

Given that Fred has a diagnosis of Spastic Quadriplegic Cerebral Palsy he falls within the definition of a disabled child for the purposes of the Children Act 1989 and is therefore a child 'in need'.

Failure to provide adequate reasons
Fred has been assessed by social services as having eligible needs and accordingly the local authority is under a duty to meet those needs. In the present case a challenge has been made concerning the quality of the assessment undertaken by the authority and material evidence submitted to support this view. In such a situation the above cited public law principles, case law and LGO reports creates a strong presumption that the local authority is required to give reasons (underpinned by evidence) as to why it continues to adhere to its view that the care plan can be reduced. No rational explanation or reasons appear to have been provided, and on this basis it is a failure that amounts to maladministration.

Irrational reasons
The authority rejected the family's request for additional support on the basis that: (a) it does not fund 'child care'; and (b) that the applicant was 'a stay – at - home mother'.

Child care is a service that local authorities are required to provide (when an assessed need is identified) under the Children Act 1989 section 17 and the Chronically Sick and Disabled Persons Act 1970 section 2. For an authority to have a policy of not providing this constitutes a fettering of a statutory duty and is unlawful.

For a local authority to decline to provide such support on the basis that the applicant is a 'stay - at - home mother' has all the hallmarks of an irrational decision. The above cited obligations under the Carers legislation require that consideration is given to providing support for all parent carers (regardless of whether they are in work or not). The specific reference to it being a 'mother' who is seeking this support raises questions that engage the Equality Act 2010. If the policy is limited to 'mothers' it constitutes direct discrimination on the ground of sex; if it is on the basis of 'stay at home parents' it constitutes indirect discrimination on the same ground (since more 'stay at home' parents are women than men) – and such a policy would have required a prior PSED assessment to be undertaken.

Actions that should be taken

The LGO has issued detailed information and guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[76] The guidance notes that an appropriate remedy may require a number of separate elements, and should be proportionate, appropriate and reasonable based on all the facts of the case. Remedies for an injustice should seek to put the person affected back in the position they would have been in were it not for the fault and may include reimbursing (in full or in part) actual, quantifiable financial loss which has directly resulted from the fault, for example benefits not paid and any avoidable, reasonable expenses – and where appropriate interest on losses.

[73] Complaint No. 12 012268, 10 October 2013.
[74] For cases concerning local authority 'panels' see Terri's case at page 30.
[75] Complaint No. 11 010 725, 16 August 2012.
[76] Local Government Ombudsman, 'Guidance on good practice: Remedies' (LGO 2014).

Given the above analysis, there would be strong grounds for requiring that:

1. the family is due an apology for the delay and maladministration that has characterised the authority's approach to this issue;
2. the authority should undertake and complete a lawful assessment of Fred's needs without delay (we would suggest within 10 working days of being requested by Fred's parents);
3. pending the lawful reassessment of Fred's needs, the local authority should reinstate the eight hours per week support;
4. the authority should consider compensating the family for the loss of the direct payment (ie the three hours per week) from the time the payment was reduced until the completion of the reassessment and the implementation of the new care and support plan for Fred.
5. the authority should provide a copy of its PSED assessment of its policy not to provide support for 'stay - at - home mothers', If the authority fails to provide this information, consideration could be made to submitting a Freedom of Information request.[77]

KUMAR'S STORY

Main topics: *Refusal to pay for childcare to enable mother to work*
Refusal to pay Direct Payments

Also considered: *Parent carers' assessments*
Young carers' assessments

Kumar, who is 13, has profound disabilities and requires all his care needs to be met by others. His mother, who is a single parent, also cares for her two other children. She works for the NHS and needs additional respite care to enable her to discharge her caring roles and also to remain in work. The local authority has a policy of refusing respite care and direct payments for 'child care' (ie to enable a parent to work).

Summary of Facts

This advice concerns Kumar, a 13 - year - old boy who has profound and complex disabilities. Kumar uses a wheelchair, he is unable to sit independently and requires all of his care needs to be met by others. He has epilepsy, is registered blind, has no receptive or expressive language and does not recognise anyone, including his mother. He has a very erratic sleep pattern which makes it exhausting to look after him. His sensory difficulties result in him becoming distressed in unfamiliar environments.

Kumar's mother is a single parent who works for the NHS and who is occasionally required to work weekends. Kumar's father used to care for him during the school holidays, but he no longer does so and does not provide any financial support. Kumar's mother does not have enough annual leave to cover looking after Kumar during the school holidays. Kumar has two siblings who are aged 15 and 9.

Kumar's mother is concerned about her ability to continue meeting his care needs. It is also a struggle for her to care for her other children, for whom she has particular concern, as she feels that the level of care that Kumar requires has a significant and adverse impact on their quality of life. These children have not received any assessments as to the impact that Kumar's needs are having on them as children and potentially as 'young carers'.

Kumar currently has two nights a week respite at school during term time and six weekends a year funded through direct payments. Kumar's mother has asked for Kumar's care package to be increased to include more care during weekends and school holidays. The local authority has refused to increase the care package due to its policy that direct payments cannot be used to fund childcare so that parents can work. Kumar's mother cannot afford to self-fund the respite care.

[77] For a precedent Freedom of Information request –see Terri's case

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989
Section 17 of the Children Act 1989 places a general duty on local authorities to provide services which promote the welfare of children in need, including the upbringing of such children by their families.[78] Disabled children and 'young carers' are included in the definition of 'children in need'.

Once it has been decided that a child is in 'need', there is an obligation on the local authority to provide services and support to meet that child's assessed needs.[79] A local authority can provide services to the family of a child in need (for example a parent or a sibling of a disabled child) if the services are provided with a view to safeguarding and promoting the welfare of the child in need.[80]

Paragraph 6 of Schedule 2 of the Children Act 1989 imposes a duty on local authorities to provide services which 'assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring'.[81] Section 17A of the Children Act 1989 makes provision for 'direct payments' to be made to (among others) the parents of disabled children who have been assessed as eligible for services under section 17 of the 1989 Act.[82]

The Direct Payment Regulations
Regulations in both England and Wales[83] authorise / require local authorities to make direct payments for, among other things, a service which they may provide under the Children Act 1989, section 17.

Statutory Children Act 1989 guidance
Binding guidance has been issued to local authorities in England and Wales in relation to the Children Act 1989 assessment process.[84] The guidance emphasises the need for review and reassessment as the child develops and his or her needs (and those of their family and caregivers) change: that assessment is 'an iterative process'.[85]

The Carers Acts
People who are providing regular and substantial care for a disabled child are entitled to a 'carer's assessment' under the Carers (Recognition and Services) Act 1995, section 1(2) and/or the Carers and Disabled Children Act 2000, section 6. The duty is owed to any such carer, be they adults or people under 18 (generally referred to as 'young carers'). Carers' assessments must consider, among other things: the sustainability of the caring relationship; the ability of the carer to continue to provide care;[86] the carer's support needs;[87] and consideration of the carer's work, education, training and leisure needs.[88]

Where a local authority is undertaking an assessment of a disabled child and it appears that an individual (including a 'young carer') may be entitled to request (but has not requested) a carer's assessment, the authority must inform the individual that she / he has a right to such an assessment.[89]

[78] Children Act 1989 s17 (1)
[79] See Broach, Clements and Read (2010) Disabled Children: a Legal Handbook, Legal Action Group, Chapter 3, paragraph 3.45.
[80] Children Act 1989 s17 (3)
[81] Children Act 1989 Schedule 2. Paragraph 6(1)(c)
[82] Including under the Chronically Sick and Disabled Persons Act 1970, s2.
[83] The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI 1887 and The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 SI No 831 (W125).
[84] In England Department for Education *Working Together to Safeguard Children*, (HM Government 2013) – and in Wales as Welsh Assembly The Framework for the assessment of children in need and their families (TSO, 2001) both issued under s7 of the Local Authority Social Services Act 1970.
[85] Ibid para 1.53 of the Welsh guidance and see also paras 52-53 of the English Guidance.
[86] Carers (Recognition and Services) Act 1995 section 1
[87] Children Act 1989 s 17 ZD
[88] Section 2 of the Carers (Equal Opportunities) Act 2004.
[89] Section 2B Carers (Recognition and Services) Act 1995.

The duty to undertake assessments of parent carers' needs has been upheld in a number of judgments[90] and Local Government Ombudsmen's reports.[91] A Welsh Ombudsman's report[92] 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'. In a Northern Irish case[93] concerning a similar situation (where an authority's failure to provide support for a carer had placed her under extreme pressure) the court noted that the effect of the authority's inaction had:

> been to relegate the carer's position as something inferior or secondary to that of the autistic child. … this was an incorrect approach to carer assessments. In taking this approach the Trust failed to recognise that the needs of the carer, the child and indeed the family are interlinked. This is clear from an examination of the language, structure and clear statutory purpose of the legislative provisions.

Guidance concerning carers

Practice guidance concerning the Carers Acts[94] requires that assessments consider the sustainability of the caring role by reference to the carer's autonomy, health and safety (particularly the risk to the carer's own health), management of daily routines and involvement[95] and that carers (including 'people with parental responsibility for disabled children') should be supported to stay in work or to return to work, if this is their wish.[96]

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so called Wednesbury rule).[97] A decision will be unreasonable if it is, for example: (1) reached after ignoring relevant evidence; (2) pre-determined because the public body has a blanket policy that deals with the question; or (3) irrational – for example it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.[98]

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*,[99] 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.[100]

Analysis: Application of the Law to the Facts

Kumar is a 'child in need'. The local authority has a duty to assist him and his family in helping them to conduct a normal life. The authority is obliged (by virtue of the Children Act 1989 and the Carers' legislation) to ensure that the care provided by Kumar's mother is sustainable; to address her need to have adequate breaks; and to enable her to devote caring time to her other children.

Confronted with the facts as outlined above a public body must comply with its legal obligations and act reasonably. The evidence provided would suggest that in the following material respects the local authority has failed to act lawfully:

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[90] 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)

[91] 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.

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

[93] JR 30 (HN, a minor) [2010] NIQB 86 at para 28. The case concerned Articles 2, 17, 18 and 18A of the Children (Northern Ireland) Order 1995 which are – for the purposes of this Opinion – indistinguishable from those imposed by the Children Act 1989, section 17 and the duty to assess carers under the Carers (Recognition & Services) Act 1995 / Carers & Disabled Children Act 2000 (Article 18A).

[94] The Carers and Disabled Children Act 2000: Carers and people with parental responsibility for disabled children: Practice Guidance. Paragraph 68

[95] Ibid paragraph 69.

[96] Ibid paras 35 - 36.

[97] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[98] See for example *R0020(South Tyneside Care Home Owners Association & Ors) v South Tyneside Council* [2013] EWHC 1827.

[99] [1983] 2 AC 613, HL

[100] 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.

1. Direct payments

As noted above, the direct payments legislation requires local authorities to make direct payments in relation to the assessed needs of a disabled child under the Children Act 1989, section 17.[101] While this requirement is subject to limited statutory exceptions there is nothing in the regulations which limits (let alone prohibits) a local authority's duty to make direct payments where the need arises due to the parent's work commitments.

In this case the basis of the authority's decision to refuse to increase the care package (and consequently the level of direct payments) appears to be based solely on its policy that direct payments cannot be used to fund childcare so that parents can work. This is not a reasonable (or indeed a lawful) reason for refusal.

The policy in question prevents any consideration of the merits of individual cases and in consequence constitutes a misunderstanding of the law and an unlawful fettering of the local authority's duties and powers in this context.

The evidence provided also suggests that the local authority has not considered Kumar's current needs or the current needs of his mother and his siblings – ie since his father withdrew from providing support.

2. Carers' rights

The evidence provided suggests that Kumar's mother 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 the fact that she requires assistance with caring for Kumar to enable her to continue working. As Kumar's mother does not have sufficient annual leave to enable her to care for Kumar during all of the school holidays, is unable to self-fund the respite care, and does not receive any financial support from Kumar's father, her employment may be at risk. On the facts, as provided, the authority has failed to give sufficient consideration to this change of circumstances and has not acknowledged the impact that this may have on the caring relationship.

While the Welsh Ombudsman's report (referred to above) concerns a parent who required respite care to enable him to pursue his University studies, it is in every other respect analogous to Kumar's mother wishing to remain in employment.

The needs of the siblings

From the documents we have been provided with, there is no evidence that Kumar's siblings' needs were considered when he was being assessed. There is also nothing to suggest that his siblings have received a separate assessment either as 'children in need' or as 'young carers'.

Kumar's mother is concerned about the impact that Kumar's condition is having on his siblings and in consequence, at law, they may fall under the definition of children 'in need'.[102] There is no evidence to suggest that this factor has been considered by the local authority and no evidence that they have been offered (or advised of their right to) an assessment under the Children Act 1989 and/or Carers Acts. The Local Government Ombudsman has held it to be maladministration not to undertake a young carer's assessment in appropriate cases.[103]

Preliminary Conclusions

Based on the information provided and the above analysis, our preliminary opinion is that the local authority is in breach of its statutory and / or public law duties in relation to the following matters:

1) its failure to provide adequate support services to Kumar and his family (in breach of the duty under the Children Act 1989, section 17);
2) its refusal to countenance the payment of direct payments to meet Kumar's assessed needs;
3) its failure to give sufficient consideration to Kumar's mother's desire to continue working;
4) its failure to consider the impact of its refusal to increase the support available to Kumar and the family;
5) its failure to conduct a carer's assessment of Kumar's mother needs and to inform her of her right to request such an assessment;
6) its failure to consider whether Kumar's siblings are children in need and / or young carers and (if they are found to be) to conduct assessments of their needs.

[101] Including under section 2 of the Chronically Sick and Disabled Persons Act 1970: The duty does not extend to payments for long periods of residential care.
[102] S17(10) Children Act 1989
[103] See for example, complaint No 07B 04696 and 07B 10996 against LB Croydon 16th September 2009;

Actions that should be taken

The local government ombudsman has issued detailed information and practice guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[104] 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 should 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'.[105] It would appear to follow that:

1) the family is due an apology from the local authority for the distress caused as a result of its failings;
2) the authority should review, without delay, its decision not to provide an increased care package (we would suggest within 3 working days of being requested by Kumar's mother);
3) if the authority's decision remains that Kumar's mother is not entitled to additional direct payments, a full explanation of the reasons for this decision should be provided without delay, together with information on the appeals/complaints process (we would suggest within 3 working days of that decision being reached);
4) the authority should immediately advise Kumar's mother of her right to a carer's assessment and, if this is requested, should conduct this expeditiously (we would suggest within 15 working days of being requested by Kumar's mother);
5) the local authority should undertake (on being requested by Kumar's mother) assessments of Kumar's siblings within a similar timescale ;
6) the local authority should consider compensating the family for the loss of the direct payment support from the time the payment was denied until the completion of the reassessment and the implementation of the new care and support plan for Kumar.

PETER'S STORY

Main topics: *Refusal to increase care package*
Local authority 'panels'

Also considered: *Parent carers' right to work*
Young carers' assessments
Review of care package

Peter is 10 and has autism and very difficult to manage behaviour that has resulted in harm to himself and his family (including his siblings). A delayed social work reassessment recommended that the care package be increased but this was over-ruled by a panel / senior manager. The family bread - winner was advised to cut down his work hours to help provide the necessary care – although neither he nor the sibling carers have been offered carers / young carers' assessments.

Summary of Facts

This advice concerns Peter who is 10 - years old. Peter has a diagnosis of severe autism, a statement of Special Educational Needs (SEN) and attends a special school. Peter's father is employed by the NHS and works long hours. His mother has given up work as a teacher to care for Peter. Peter has three siblings, aged 11, 7 and 3.

Peter struggles to cope outside the family home, has no recognition of danger and is unaware of the injuries he causes to himself and others. Peter's condition presents particular difficulties in the form of aggressive and violent outbursts. These have caused significant and regular injuries to other family members, particularly his 11 year old brother, who assists in the care of Peter in the evenings and at weekends. Peter's seven-year-old sister frequently assists in the care of the three-year old, as her mother and brother are occupied with Peter. Lack of sleep is an issue for the family as Peter is often awake and disruptive at night.

[104] LGO (2005) Guidance on Good Practice 6: Remedies.
[105] LGO Guidance p3.

Peter's parents are concerned about the impact on Peter's siblings, not only of Peter's behaviour, but also of the caring roles that the siblings are undertaking, and of the lack of attention that the parents are able to give the siblings because of the care they have to provide to Peter – for example that they have little or no time to help their other children with their homework. This has a particular impact on Peter's older brother, who has dyslexia and is starting to struggle at school. They are also concerned about their seven-year old daughter, who is becoming quiet and withdrawn. Peter's mother is suffering from stress, for which she is receiving counselling but does not wish to resort to anti-depressant medication.

The family currently receive direct payments to cover 15 hours of help per week at home as a result of a detailed (core) assessment that took place four years ago. Direct payments are used to employ a personal assistant who frequently works a significant number of extra unpaid hours. The family have in the past been referred to Children and Adolescent Mental Health Services (CAMHS) but found that the advice it offered did not provide any substantive help or result in any significant improvement in their situation.

As a result of these difficulties, Peter's parents have asked for an increase in his care package to cover assistance in the evenings and on Sundays as well as a weekly 24 hours respite stay at a local residential autism school. This resulted, nine months ago, with the commencement of a re-assessment of his needs – however this was not 'signed off' until two months ago, the delay being attributed by the local authority to 'staffing pressures'. The social worker responsible for the assessment recommended that additional support should be considered at the weekends for an interim period and also advised that a further referral to CAMHS be made. A senior manager or a local authority 'panel' decided however, that there should be no increase in the care package. It did however suggest that Peter's father should reduce his working hours to enable him to give greater assistance to Peter's mother in meeting Peter's care needs.

Peter's mother has received a 'carer's assessment' but his father and his siblings have not.

The Relevant Law and Guidance

Statutory Principles
Children Act 1989

For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families.

Schedule 2 Part 1 para 6 of the 1989 Act in addition places a duty on local authorities to provide services designed-

(a) to minimise the effect on disabled children within their area of their disabilities;
(b) to give such children the opportunity to lead lives which are as normal as possible; and,
(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

Section 17A of the 1989 Act (in combination with the relevant regulations[106]) places a duty on local authorities to make direct payments to the parents of a disabled child to meet their child's assessed needs subject to it being satisfied that the disabled child's welfare 'will be safeguarded and promoted by securing the provision of it by the means of the direct payment'.[107] It has been suggested that if a local authority considers that direct payments are not suitable in a particular case, it is 'obliged to provide cogent reasons for its opinion'.[108]

[106] The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI 1887 and The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 SI No 831 (W125).
[107] English Regulations reg 7(2); Welsh Regulations reg 8(2).
[108] Clements, L and Thompson, P *Community Care and the Law 5th edition* (Legal Action 2011) para 12.30.

Children Act guidance

The key guidance document in relation to the Children Act 1989 assessment process is *Working Together to Safeguard Children*[109], issued under s7 of the Local Authority Social Services Act 1970 and therefore binding on local authorities.[110] This stipulates (paragraph 57) that an assessment should be completed within 45 working days from the date of referral and that where this timeframe is exceeded, the reasons for this must be recorded. *Working Together* also states that, regardless of the timescale involved, services to support the child and their family should be commissioned prior to the conclusion of the assessment where particular needs are identified and /or that in certain circumstances a quick assessment is required.[111]

Under *Working Together*, an assessment should be focused on outcomes and, where necessary, should result in a plan of action for the child and their family, which should "set out what services are to be delivered, and what actions are to be undertaken, by whom and for what purpose" (paragraph 50). The High Court has held that the obligations detailed in the statutory guidance must be followed.[112]

Statutory guidance concerning 'short break' care issued in 2010 states that local authorities are under a 'minimum requirement to hold reviews every six months for children who receive services under section 17 of the 1989 Act'.[113]

Chronically Sick and Disabled Persons Act 1970

In addition to the requirement to provide services cited above, disabled children are entitled to services under the Chronically Sick and Disabled Persons Act 1970, section 2 for a range of support needs, including (a) 'practical assistance for that person in his home.'

The Carers Acts[114]

People with a parental responsibility for a disabled child who are providing a substantial amount of care to the child on a regular basis are entitled to an assessment under the Carers (Recognition and Services) Act 1995, section 1(2) and the Carers and Disabled Children Act 2000, section 6. Any such assessment must consider, amongst other things: (1) the sustainability of the caring relationship and the ability of the carer to continue to provide care;[115] whether a parent carer of a disabled child requires support, and if so, what their support needs are;[116] and consideration of the carer's work, education, training and leisure needs.[117]

The above - cited duty on local authorities to safeguard and promote the welfare of children in need (Children Act 1989, s17) includes a duty to support 'young carers'. The Local Government Ombudsman has held it to be maladministration not to undertake such assessment in appropriate cases.[118] The Department of Health has advised that 'inappropriate caring roles or long hours of caring are likely to have a detrimental impact on young carers' lives, including their health and educational achievement',[119] a point echoed by the Association of Directors of Children's Services[120] that:

> care services should be delivered in ways which sustain families, avoids the need to take on inappropriate caring roles and prevents further inappropriate caring' [including that] children are protected from excessive or inappropriate caring roles; further inappropriate caring is prevented; parents feel supported in their parenting role.

[109] Department for Education (2013).

[110] Working Together to Safeguard Children, HM Government, March 2013.

[111] Paragraph 58 states: "Whatever the timescale for assessment, where particular needs are identified at any stage of the assessment, social workers should not wait until the assessment reaches a conclusion before commissioning services to support the child and their family. In some cases the needs of the child will mean that a quick assessment will be required".

[112] See for example, R (AB and SB) v Nottingham CC [2001] EWHC 235 (Admin); (2001) 4 CCLR 294 at 306G–I.

[113] Department for children schools and families *Short Breaks Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks* (2010) para 3.21.

[114] The Carers (Recognition & Services) Act 1995, the Carers & Disabled Children Act 2000 and the Carers (Equal Opportunities) Act 2004.

[115] Section 1 of the Carers (Recognition and Services) Act 1995 states that the assessment must assess the carer's 'ability to provide and continue to provide care' for the person he or she cares for.

[116] Children Act 1989 s17ZD.

[117] S2 Carers (Equal Opportunities) Act 2004.

[118] See for example, complaint No 07B 04696 and 07B 10996 against LB Croydon 16th September 2009; see also Department of Health, Department for Education and Employment and Home Office (2000) *Framework for assessing children in need and their families* (policy guidance); and Welsh Assembly Government (2001) *Framework for assessing children in need and their families*.

[119] Department of Health *Recognised, valued and supported: Next steps for the Carers Strategy* (2010) para 2.1).

[120] 'Working together to support young carers' 2009 (page 5) which cites *Putting People First: a shared vision and commitment to the transformation of adult social care*, HM Government and others, December 2007 (para 3.2)

Practice Guidance

Practice guidance concerning the Carers Acts[121] requires that assessments consider the sustainability of the caring role by reference to the carers' autonomy, health and safety (particularly the risk to the carer's own health), management of daily routines and involvement[122] and that carers (including 'people with parental responsibility for disabled children') should be supported to stay in work or to return to work, if this is the carer's wish.[123]

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so called Wednesbury rule).[124] A decision will be unreasonable if it is, for example: (1) based on irrelevant evidence; or (2) reached after ignoring relevant evidence.

Duty to make decisions on the basis of the relevant evidence

Public bodies must take into account all relevant considerations before making decisions and must ignore the irrelevant. Where the practical evidence is 'largely one way' then absent unusual facts, the decision must be in accordance with that evidence.[125] The practical evidence for social care assessments comes from the social services employee undertaking an assessment, listening to the disabled person, his or her carers and considering the other relevant evidence (eg medical / OT reports). It is this assessment, based on all the relevant information that is the practical evidence on which the decision should be based. In a number of cases the Courts as well as the Joint Committee on Human Rights have questioned the legality of 'panels' that overrule social work recommendations, the basis for this concern being that the panel is not making a decision 'in accordance with the evidence'.[126]

The Local Government Ombudsman has also made a number of comments to this effect. In a 2005 report, for example, he held that where an assessment has been carried out, a purchasing panel (and by implication a manager) cannot override the judgment of the assessor without providing clear reasons for doing so.[127]

Analysis: Application of the Law to the Facts

Timescale

The reassessment / review of Peter's needs took over six months to complete – well outside the timescale stipulated in law. The local authority has explained that the reason for this extensive delay was 'staffing pressures' but no substantive reason (such as a requirement for expert reports) has been provided. This delay constitutes maladministration on the part of the local authority. Although a passing apology has been made to the family for this failing, no effort was made to mitigate the effect on the family of the serious delay, or to assess whether any services were required in the interim. Given the gravity of the family's circumstances, and particularly the stress and physical injuries suffered by family members, this omission appears to be not only a breach of the binding guidance in force, but also a breach of the local authority's duty of care to both Peter and his family.

Inadequacy of the detailed assessment

The assessment documentation provided does not meet the standards set out in law, as outlined in the cases cited above. The detailed assessment contains no significant indication as to appropriate outcomes for Peter and his family, or clear plan of action. In relation to a number of needs which have been identified, there is limited indication of how these will be met, other than references to 'direct payments'. It is unclear whether these are references to the amount of direct payments that the family is currently receiving, or whether an increased amount in the hours of care is necessary. Furthermore, there is no adequate discussion of the parents' concerns that the number of care hours currently provided for

[121] The Carers and Disabled Children Act 2000: Carers and people with parental responsibility for disabled children: Practice Guidance. Paragraph 68.

[122] Ibid paragraph 69.

[123] Ibid paras 35 - 36.

[124] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[125] *R v Avon CC ex p M* (1999) 2 CCLR 185, QBD.

[126] For a detailed commentary on these decisions / reports see Luke Clements and Pauline Thompson *Community Care & the Law,* (5th edn, Legal Action Group 2011) para 3.188 – 3.191 which can be accessed at www.lukeclements.co.uk/resources-index/files/PDF%2008.pdf

[127] LG Ombudsman Complaint no 04/A/10159 against Southend on Sea BC, 1 September 2005. The decision concerned a matter in which a plan drafted by a social worker following a detailed assessment was rejected by the local authority's care purchasing panel on the advice of the social worker's manager with limited knowledge of the service user. The Ombudsman stated: 'Having correctly prepared a detailed assessment in accordance with the statutory guidance, it was wrong for the council to dismiss all the information gathered in that process, and make a decision on the basis of [the acting manager]'s assurance. The decision flew in the face of the assessment'.

by direct payments is no longer adequate for them to continue to support Peter safely at home and maintain a safe family life for Peter's siblings. There is no reference to the fact that the carer currently employed to assist Peter frequently and regularly works extra hours to meet his needs. There is no indication in the care plan as to the specific number of hours of care required for Peter and how these will be met.

Local authority panel / manager overriding assessor's decision

The detailed assessment document recommends that additional support should be provided to the family over the weekends for an interim period whilst the family seek additional support and pending a referral to CAMHS. However, it is clear from the documentation provided that this recommendation was overridden (although it is not clear if this was done by a senior manager or by local authority 'panel'). No reasons have been given for this decision. It is clear from the decisions of the Ombudsmen outlined above that managers / purchasing panels cannot override the decision of an assessor without providing clear and cogent reasons. Given that the family consider that their circumstances are unsustainable without further support, and that the assessment documentation indicates that additional support is required, the local authority is required to provide an adequate explanation of its decision that no further support is necessary. In the absence of such an explanation, it is arguable that the local authority is acting unreasonably and irrationally.

Recommendations in the detailed assessment

The evidence provided to the Cerebra project/LERP suggests that the current amount of support provided to Peter's family is inadequate, both to meet the needs of Peter and his wider family, and to ensure Peter's safety and the safety of other family members, particularly Peter's mother and older brother. Despite this, the documentation provided indicates that the only concrete outcome of the detailed assessment in terms of further support offered to Peter and his family is the referral to CAMHS. This appears to be a wholly inadequate response to the acute needs experienced by Peter and other family members, particularly in the light of the injuries sustained by Peter's older brother and the risk to Peter himself.

Given that the family have found contact with CAMHS in the past to be of very limited (if any) assistance, it is incumbent on the local authority to explain why a further referral is an adequate or appropriate response to Peter's needs or the difficulties currently being experienced by the family as a whole. No such explanation is given in the papers provided to the Cerebra project/LERP. Given that the local authority is insisting upon a course of action which has failed in the past, this decision (in the absence of detailed reasons) is arguably both irrational and unreasonable.

The papers provided also indicate that the local authority has advised Peter's parents that Peter's father should reduce his working hours in order to be able to provide more support in the family home. Given that: (1) Peter's mother has already given up her job and relinquished her career in order to provide full time care for Peter outside school hours; and (2) the above - cited Government guidance – this recommendation appears (without further explanation) unreasonable.

The carers' assessment

The copy of the carers' assessment that has been provided to the Cerebra project/LERP appears to be wholly inadequate. While ostensibly an assessment of need of both Peter's parents, it concentrates entirely on the circumstances of his mother, while his father is not mentioned.

All the evidence provided to the Cerebra project/LERP indicates that Peter's mother is under severe strain. She is undergoing counselling and her relationship with Peter's father and their other three children is under stress. It is clear that her autonomy is significantly compromised. Her management of daily routines is suffering and she believes that she is unable to provide adequate attention to her other children because of the demands of supporting Peter.

No mention is made of these concerns in the assessment, and no indication or recognition is given of her decision to give up work to care for Peter and the significant impact that this has had on her career and her personal fulfilment. Her health needs and the risk to her mental health are neither acknowledged nor addressed. While the assessment contains a descriptive account of the family situation, it gives no proposals or plan for how the caring relationship can be sustained in the future. The extra contribution to Peter's care that the family's personal assistant frequently makes at no charge has been overlooked. Given that Peter's welfare rests on the willingness and ability of the assistant to provide this extra care, this is a serious omission, both in relation to Peter's parents' needs and the sustainability of the caring relationship.

Overall, the assessment documentation provided to the Cerebra project/LERP is materially inadequate. If this is the only relevant documentation, then the local authority would appear to be in breach of its legal

duty to provide carers' assessments which meet the requirements stipulated in both legislation and guidance. While it appears that there is a critical risk to the caring relationship, as outlined in the guidance cited above, no support plan has been put in place to offset this.

The situation of Peter's siblings

The information provided to the Cerebra project/LERP indicates that the imperative of meeting Peter's carer needs is preventing his parents from providing their other children with the attention and support they require. In particular, the parents have provided documentary evidence (including photographic evidence) of injuries sustained by Peter's brother as a result of Peter's assaults on him. They have also stated that Peter's brother has special educational needs stemming from his dyslexia but that they are unable to support him with homework. They are concerned that Peter's brother is falling behind at school. In addition, they are concerned about the emotional impact of the family situation on Peter's sister, who is becoming quiet and withdrawn. Under these circumstances, it is arguable that Peter's siblings (particularly his brother and older sister) fall under the definition in the Children Act 1989 of 'children in need' and are entitled to assessments of their own needs including the impact of being 'young carers' (under bother the Children Act 1989 and the Carers Acts). There is no indication that any such assessments have been carried out and it therefore appears that the local authority is in breach of its statutory duties in this respect.

Preliminary Conclusions

Based on the information provided and the above analysis, our preliminary conclusions are that the local authority:

1. is in breach of its statutory duty to provide a full and adequate detailed assessment for Peter, as a child in need and to provide adequate services to promote the welfare of Peter;
2. has acted irrationally in failing to provide sufficient explanations for its refusal to provide additional support to Peter and his family;
3. has acted irrationally and unreasonably in recommending a referral to CAMHS without adequate explanation for this recommendation, and in advising that Peter's father should reduce his working hours;
4. has acted irrationally and unreasonably in failing to provide (at the very least) short term assistance to Peter's parents to relieve the critical circumstances they are experiencing, and to reduce the risk of family members sustaining further physical and mental harm;
5. failed to comply with the timescale stipulated in binding guidance for the production of a detailed assessment;
6. is in breach of its statutory duty to provide a full and adequate carer's assessment for Peter's mother and potentially his father; and
7. is in breach of its statutory duty to provide 'children in need' / 'young carers' assessments for Peter's brother and the elder of his sisters.

Actions that should be taken

The Local Government Ombudsman has issued detailed information and guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[128] The guidance notes that an appropriate remedy may require a number of separate elements, and should be proportionate, appropriate and reasonable based on all the facts of the case. Remedies for an injustice should seek to put the person affected back in the position they would have been were it not for the fault and may include reimbursing (in full or in part) actual, quantifiable financial loss which have directly resulted from the fault, for example benefits not paid and any avoidable, reasonable expenses – and where appropriate interest on losses.

[128] Local Government Ombudsman, 'Guidance on good practice: Remedies' (LGO 2014).

Given the above analysis, it follows that:

1) 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.
2) The authority should make the following expedited arrangements (we have put in brackets the suggested timescale for these actions):
   (a) to review its decision not to provide immediate additional assistance to the family as recommended by detailed assessment and to advise Peter's parents of the outcome of this review, giving clear and detailed reasons for its decision (3 working days);
   (b) if the review in (a) above is positive to:
      (i) confirm an immediate increase in the direct payment support to cover Peter's additional care needs; and
      (ii) a comprehensive care plan in respect of Peter's needs, which meets the standards established by case law (5 working days);
   (c) to review its decision to require the family to accept a further referral to CAMHS and to advise Peter's parents of the outcome of this review, giving clear and detailed reasons for its decision (5 working days);
   (d) to confirm that it will undertake full and adequate carers' assessments of Peter's mother and father (3 working days) and to conduct these assessments (10 working days); and
   (e) To confirm that it will undertake children in need / young carers' assessments of Peter's siblings (3 working days) and conduct these assessments (15 working days); and
   (f) to retract its suggestion that Peter's father should reduce his working hours;
   (g) the authority should consider compensating the family for the failure to provide the necessary support and for the distress and actual harm they have experienced as a result of the authority's failings.

TERRI'S STORY

Main topics: *A 'panel' decision overruling a social worker's assessment of need*
A refusal to provide additional care needs due to the local authority's resource shortages
An adolescent child's wish not to have her parents involved in her intimate care.

Also considered: *Duty to provide adequate reasons for a refusal to provide care.*

Terri is 14 and has Cerebral Palsy, and is fully dependent on her carers in all aspects of her daily care needs. Terri's social care assessment identified a need for increased care support and noted her expressed wish for paid carers (rather than her parents) to provide support when tending to her personal care needs – that 'she is a teenager and she feels that she wants and needs to have more privacy at these times'. The recommendation for increased support was refused by a local authority 'panel' on the grounds that the authority had 'to save money'.

Summary of Facts

This advice concerns Terri, a 14 year old girl who lives with her parents. Terri has Cerebral Palsy and attendant muscle spasms and contractions (dystonia) for which she has a deep brain stimulation system implant that is only of limited benefit. Terri is quadriplegic and her social care assessment (April 2014) notes that she is 'fully dependent on her carers in all aspects of her daily care needs... [Her] moving and handling needs are increasing due to the difficulties she experiences in respect of her dystonic movements and the scoliosis to her spine [and it is envisaged that her] moving and handling needs will increase as she gets bigger'. The assessment notes that Terri's Occupational Therapist (OT) has assessed her as needing 2:1 support at all times when tending to her personal care, toileting and moving and handling needs'.

Terri's parents also care for her 17 year old brother who has severe impairments and requires 3:1 care.

Terri's parents are not in good health. One has an underlying medical condition which means she is not able to provide physical handling or similar support. Both are recorded in the assessment as exhausted and both receive support from their GP to cope with their anxiety / depression resulting from their caring roles.

Terri's social care assessment identified a need for increased care support from the local authority. This additional need arose, in part, out of Terri's expressed wish for 'carers, rather than her parents, to provide support when tending to her personal care needs' – that 'she is a teenager and she feels that she wants and needs to have more privacy at these times'. The assessment records that Terri's parents 'have and continue to offer [her] immense emotional support. They report that it can be emotionally and mentally wearing for them as parents.'

Three months after the assessment, a submission was put forward to a local authority 'panel' seeking an increase in Terri's care package to provide (in part) 'support when tending to her personal care needs'.

After the panel meeting Terri's parents were informed by telephone that the additional support had been refused. No reason was given for this refusal at that time. In response to being notified that the family wished to challenge this decision the local authority advised that this was not possible – but that mediation would be arranged. The following month, in a further telephone conversation the family was informed that mediation was no longer possible and that the reason for the refusal to meet Terri's additional needs was that the local authority had 'to save money'.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989

For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families.

Schedule 2 Part 1 para 6 of the 1989 Act (Provision for disabled children) in addition places a duty on local authorities to provide services designed to-

(a) minimise the effect on disabled children within their area of their disabilities;
(b) give such children the opportunity to lead lives which are as normal as possible; and
(c) assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

Section 17(4A) provides that a local authority should take into consideration the child's wishes and feelings regarding the provision of services and give due regard to these wishes.[129] Services which should be provided for children living with their families are set out in Part 1 Schedule 2 Paragraph 8 and include 'home help'.

Children Act 1989 Regulations
Children Act 1989 Representations Procedure (England) Regulations 2006

The 2006 regulations require that children's services departments in England have a complaints procedure by which disabled children and their parents are able to challenge decisions concerning (among others) the provision of social care support services. The statutory guidance[130] accompanying the regulations stresses the importance of local authorities informing families of their right to make a complaint.

Statutory Guidance ~ Working together to safeguard children (2013)

'Binding'[131] statutory guidance in England[132] reminds local authorities that they are under a duty to 'ascertain the child's wishes and feelings and to take account of them when planning the provision of services' (page 30); it stresses the importance of local authorities developing 'a culture of listening to children and taking account of their wishes and feelings' (page 48); and of ensuring that a child's needs are paramount and 'should be put first, so that every child receives the support they need before a problem escalates' (page 7).

[129] S17(4A), "Before determining what (if any) services to provide for a particular child in need in the exercise of functions conferred on them by this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—
(a) ascertain the child's wishes and feelings regarding the provision of those services; and
(b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain."

[130] Department for Education and Skills *Getting the Best from Complaints Social Care Complaints and Representations for Children, Young People and Others* 2006 para 4.2.1. – 4.2.2.

[131] The Guidance is statutory guidance issued under Local Authority Social Services Act 1970 s7 and as such children's services departments are bound to follow it unless there is good reason not to do so – see *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119 at 123 J–K.

[132] Department for Education *Working together to safeguard children* (2013).

At para 57 the guidance states:

> The maximum timeframe for the assessment to conclude, such that it is possible to reach a decision on next steps, should be no longer than 45 working days from the point of referral. If, in discussion with a child and their family and other professionals, an assessment exceeds 45 working days the social worker should record the reasons for exceeding the time limit.

Chronically Sick and Disabled Persons Act 1970 (CSDPA 1970)

Section 2 of this Act places a specific duty on the local authority to provide (among other things) practical assistance in the home for a disabled child.

Human Rights Act 1998

Section 6 makes it unlawful for a public body to act in such a way that violates a person's 'convention rights'. 'Convention rights' in this context, includes Article 8 of the European Convention on Human Rights which requires that public bodies show respect for the private and family life[133] of individuals. It has been held that respect for human dignity constitutes the 'very essence of the Convention'.[134] In *R (A and B) v East Sussex CC* (2003)[135] the High Court noted that Article 8 of the Convention protected not only disabled people's physical and psychological integrity but also 'their carers' dignity rights' and the principle was also held to be relevant in *R (Bernard) v London Borough of Enfield* (2002)[136] where a local authority was held to have failed to take positive measures to enable the disabled person and her carer 'to enjoy, so far as possible, a normal private and family life'.

UN Convention on Rights of Persons with Disabilities (CRPD)

Article 7(3) of the CRPD requires, among other things, that states:

> ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

The UK ratified the CRPD in 2009 and the higher courts have considered the Convention's principles a valuable tool when seeking to interpret the extent and nature of the obligations imposed by domestic laws on public bodies.[137]

UN Convention on Rights of the Child

Article 23 states that a 'disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'.[138] The UK has also ratified this Convention, and as with the CRPD the higher courts have referred to its provisions when seeking to interpret the extent and nature of the obligations imposed by domestic laws on public bodies.[139]

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so called *Wednesbury* rule).[140] A decision will be unreasonable if it is, for example: (1) based on irrelevant evidence; (2) reached after ignoring relevant evidence; (3) pre-determined because the public body has a blanket policy that deals with the question; (4) irrational – for example it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.[141]

Duty to make decisions on the basis of the relevant evidence

Public bodies must take into account all relevant considerations before making decisions and must ignore the irrelevant. Where the practical evidence is 'largely one way' then absent unusual facts, the decision must be in accordance with that evidence.[142] The practical evidence for social care assessments comes from the

[133] European Convention on Human Rights, Article 3 and Article 8

[134] *Pretty v UK* Application no. 2346/02 29 April 2002 para 65; [2002] 35 EHRR 1.

[135] [2003] EWHC 167 (Admin), (2003) 6 CCLR 194.

[136] [2002] EWHC 2282 (Admin), (2002) 5 CCLR 577.

[137] See for example *Burnip v. Birmingham City Council* [2012] EWCA Civ 629, and *R (Bracking and others) v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

[138] Article 23, 1.

[139] See for example, *Mabon v Mabon* [2005] EWCA Civ 634, and *ZH v Secretary of State for the Home Department* [2011] UKSC 4.

[140] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[141] See for example *R0020(South Tyneside Care Home Owners Association & Ors) v South Tyneside Council* [2013] EWHC 1827.

[142] *R v Avon CC ex p M* (1999) 2 CCLR 185, QBD.

social services employee undertaking an assessment, listening to the disabled person, his or her carers and considering the other relevant evidence (eg medical / OT reports). It is this assessment, based on all the relevant information, that is the practical evidence on which the decision should be based. In a number of cases the Courts and Ombudsmen as well as the Joint Committee on Human Rights have questioned the legality of 'panels'' that overrule social work recommendation,: the basis for this concern being that the panel is not making a decision 'in accordance with the evidence'.[143]

Duty to disregard irrelevant evidence

Once a local authority has decided that a disabled child has an eligible need for support under the CSDPA 1970 that need must be met regardless of the state of a local authority's finances: a local authority is unable to 'refuse to make such a provision simply because it [does] not have the necessary resources'.[144]

Duty to Give Reasons

Although there is no general duty on public bodies to give reasons for their decisions, 'reasonableness' will require that they do give reasons where the interests of justice require. In such cases the reasons need not necessarily 'be elaborate nor lengthy. But they should be such as to tell the parties in broad terms why the decision was reached.' [145] In an analogous social care assessment case[146] the Court of Appeal held that the common law (and 'fairness') required that the council explain how it had reached its decision. The reasons must not only be clear – they must be lawful and given in a timely way so that the individual concerned is able to exercise their right to seek a review of that decision.

Duty to act without delay

Where a statutory provision provides no timescale for the discharge of an obligation, the courts require that it should be done 'within a reasonable period'.[147] What constitutes a 'reasonable time' is a question of fact, depending on the nature of the obligation.[148]

Analysis: Application of the Law to the Facts

Terri is a disabled child for the purposes of the Children Act 1989 and accordingly a 'child in need' for the purposes of s17 of that Act. The local authority has a duty to assist her and her family in helping her to conduct a normal life. It is statutory requirement that Terri's wishes are heard by the local authority in relation to her care. Terri no longer wants her parents to bathe her and is adamant that she have more privacy. Terri is supported by her parents who have stressed that they no longer feel comfortable carrying out her intimate care when she is not happy with this.

A further relevant consideration for the local authority is the need to ensure that the care provided by Terri's parents is sustainable – and to address their need to have adequate breaks from their extensive caring roles. This is particularly pressing given their specific health care difficulties.

Confronted with the facts as outlined above a public body must comply with its legal obligations and act reasonably. The evidence provided would suggest that in the following material respects the local authority has failed to act lawfully:

The duty to act without delay

As noted above, where a statutory provision provides no timescale for the discharge of a duty (as is the case with the obligation to provide a decision following an assessment of a disabled child's social care needs) the courts require that it should be done 'within a reasonable period' and what constitutes a 'reasonable time' is a question of fact, depending on the nature of the obligation.

[143] For a detailed commentary on these decisions / reports see Luke Clements and Pauline Thompson *Community Care & the Law*, (5th edn, Legal Action Group 2011) para 3.188 – 3.191 which can be accessed at www.lukeclements.co.uk/resources-index/files/PDF%2008.pdf

[144] *R v South Lanarkshire Council ex p MacGregor* (2000) 4 CCLR 188 and see also *R v Gloucestershire CC ex p Barry* [1997] 2 WLR 459, (1997–98) 1 CCLR 40, HL.

[145] *Stefan v The General Medical Council (Medical Act 1983)* [1999] UKPC 10 at para 32.

[146] *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209.

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

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

The statutory guidance (*Working Together* noted above) stipulates that the maximum timeframe for an assessment from the point of referral to the point it is 'possible to reach a decision' as being 45 working days. In this case, three months (ie about 65 workings days) elapsed from the determination of the social worker's assessment to the decision of the 'panel'. Given the significant family difficulties that are evidenced in the assessment, it would appear (in the absence of explanation) that such a delay is unreasonable and accordingly constitutes maladministration and a breach of the local authority's public law obligations.

The duty to give reasons

The above case law supports strongly the requirement that there is a duty on the local authority to provide intelligible and timely reasons for the decision it reached – namely that the increased care need identified by the assessment should not be provided. It appears that no reason was given for this decision for a month, and that when one was advanced – namely the local authority's financial difficulties – it was (without further explanation) unlawful. The failure resulted in the family being unable to pursue a timely appeal and it would appear to constitute maladministration and a breach of the local authority's public law obligations.

The duty to act rationally

a) The duty to make decisions in accordance with the evidence
   The evidence that has been provided to the Cerebra Legal Entitlements Research Project would appear to be 'all one way'. The submission to the panel made the case for an increase in the care and support package to be provided for Terri and contained no indications that this was not an eligible need. The submission was the product of a lengthy assessment undertaken by the local authority social worker who met the family and heard all the relevant evidence – particularly that of Terri's wishes and feelings. In the absence of cogent evidence to the contrary (and having regard to the above judicial, parliamentary and ombudsmen concerns about 'panels' overruling similar submissions) the decision not to provide the additional care recommended in the social work submission would appear to constitute maladministration and a breach of the local authority's public law obligations.

b) The duty to give lawful reasons
   Although, as noted above, there is no general duty on public bodies to give reasons for their decisions, a refusal to agree to an increased care package recommended by the social services' assessor would appear to be a decision for which reasons must be provided: not least that the individual has a right to seek a review of that decision – which right would be largely illusory if reasons are not available. In the present case the requirement to provide lawful reasons is all the more pressing given that the evidence in support of the eligible need being met was 'largely all one way'.

   The only reason that appears to have been advanced for the local authority's decision is its resource difficulties – which for the reasons given above, is not in itself a lawful reason.

The duty to explain the right to challenge the decisions

The documentation provided to the Cerebra Legal Entitlements Research Project contains no statement advising the family of its right to challenge the decision to refuse the recommended support. While there would appear to be nothing wrong with a local authority offering mediation, this option cannot delay or exclude the family's statutory right to complain. On the basis of the information supplied, the family were not advised or supported to complain and their attempted complaint was frustrated by a diversion into 'mediation' (which did not materialise). On this basis there appears to have been maladministration and a breach of the local authority's public law obligations.

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 acted improperly by:
   a) Unreasonably delaying the making of a decision concerning Terri's additional care needs;
   b) Failing to provide adequate and lawful reasons for its decision;
   c) Failing to support the family in the making of a challenge to its decision
2. The relevant practical evidence is 'largely one way' – namely that Terri's additional needs are eligible needs and accordingly must be met.

Actions that must be taken

The local government ombudsman has issued detailed information and practice guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[149] 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 should 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'.[150] It would appear to follow that:

1. The family is due an apology for the delay and maladministration that has characterised the authority's approach to this issue in the past;

2. Pending any assessment that the local authority may consider necessary, the additional care needs identified by the social care assessment should be provided without delay;

3. The authority should consider paying compensation to the family for the 'lost support' – support that should have been provided, the amount being calculated as the weekly additional cost of the package identified in the assessment multiplied by the number of weeks for which this was not provided.

BILLIE'S STORY

Main topics: *Unforeseen school transport problem / a 'one-off' family expense.*

Also considered: *Equality Act 2010 duties.*

Billie is 9 and has Attention Deficit Disorder and Autism. Billie does not have a Statement of Special Educational Needs but she attends a school that has a specialist division specifically for people with autism. Due to a serious problem with her car, Billie's mother is no longer able to transport her to her school and her request to the local authority that it provide school transport for Billie (or a loan to help pay for the car repair) has been refused. No reason has been provided for the refusal to make a loan but the school transport support has been refused because the school Billie attends is not the one within her catchment area.

Summary of Facts

The advice concerns Billie who is nine years old and has Attention Deficit Disorder (ADD) and Autism. Billie's other / associated difficulties include hypersensitivity; obsessional behaviour (including a fear of not being late for school); and a complete lack of awareness of danger. Billie does not have a Statement of Special Educational Needs[151] but the school she attends has been chosen by her mother because it has a specialist division specifically for people with autism. Billie has settled well at the school and due to this and her fixed routine has shown considerable improvement in her sense of well-being and her behaviour.

Due to a serious problem with her car, Billie's mother is no longer able to transport her to her school. The school is about 3.5 miles away and for various reasons 'not walkable'. Whilst 3.5 miles is outside the statutory school walking distance, the local authority has refused to facilitate the journey by means of a school bus (which is available) because the school she attends is not the one within her catchment area.

Billie is unable to use public transport alone and even if her mother were able to accompany her (she has other caring responsibilities) the journey would take over 2 hours each way and cost £12.00 per day. This is money which she does not have, especially as she is trying to save to pay for the repairs that her car requires.

[149] LGO (2005) Guidance on Good Practice 6: Remedies.

[150] LGO Guidance p3.

[151] For details of the legal obligations on a local authority to provide transport for a disabled child to a school named in that child's Statement of Special Educational needs – see Claire's story.

Billie's mother has asked the local authority to allow her daughter to take the school bus to her usual school or to provide her with help to pay for the car repairs: both requests have been refused. In both cases the local authority has failed to provide reasons for its decision, save only to state that there is a school that is available to Billie within her catchment area and within walking distance.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989
For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17 of the Act places a duty on local authorities to provide services, which will (among other things) minimise the effect of disabilities on disabled children and provides powers including the power to provide financial assistance, which may be in the form of a loan, cash payment or payment in kind.

Schedule 2 Part 1 para 6 of the 1989 Act (Provision for disabled children) in addition places a duty on local authorities to provide services designed-

(a) to minimise the effect on disabled children within their area of their disabilities;
(b) to give such children the opportunity to lead lives which are as normal as possible; and
(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

The Local Government Acts 1972 and 2000
A local authority may provide financial assistance to an individual under the Local Government Acts 1972 and 2000. Under section 2 of the 2000 Act authorities have the power to give such assistance if it will lead to the promotion of economic, social or environmental well-being of their area. Section 111 of the 1972 Act empowers authorities to do anything that will facilitate, or is conducive or incidental to, the discharge of any of their functions. It follows that authorities have power to provide financial support if desired.

Education Act 1996
The principal provisions that govern local authority responsibilities for making suitable school and travel arrangements for children are contained in Part IX Chapter II of the Education Act 1996. Section 508B[152] places a duty on English local authorities to put in place for eligible children suitable and free home to school travel arrangements, for the purpose of facilitating their attendance at school. Schedule 35B of the 1996 Act defines an eligible child as being one (having regard to – among other things – the child's disability) who cannot reasonably be expected to walk to school. The Courts have held that even where there is no duty to transport, local authorities have a power to do this and are accordingly under a duty to consider the use of this power in individual cases.[153]

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(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.

Equality Act 2010
The Equality Act 2010 section 19 makes unlawful, policies that (among other ways) put disabled children at a particular disadvantage when compared to children who do not have a similar impairment – when the policies cannot be shown 'to be a proportionate means of achieving a legitimate aim.'[154]

[152] Inserted by Education and Inspections Act 2006.
[153] *A v. North Somerset Council* [2009] EWHC 3060 (Admin); [2010] E.L.R. 139
[154] 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.

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

Section 149 of the Act places a duty on local authorities to promote equality for (among 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 Act.[155]

2014 Department for Education and Skills 'Home to School Travel and Transport Guidance'[156] stresses at para 44 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 school transport difficulties. In his report[157] 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'.

Relevant Public Law Provisions

Duty to act reasonably

Public bodies must act reasonably (the so called *Wednesbury* rule).[158] A decision will be unreasonable if it is, for example: (1) based on irrelevant evidence; (2) reached after ignoring relevant evidence; (3) pre-determined because the public body has a blanket policy that deals with the question; (4) irrational – for example it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.

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*,[159] 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.[160]

Duty to Give Reasons

Although there is no general duty on public bodies to give reasons for their decisions, 'reasonableness' will require that they do give reasons where the interests of justice require. In such cases the reasons need not necessarily 'be elaborate nor lengthy. But they should be such as to tell the parties in broad terms why the decision was reached.'[161] In an analogous social care assessment case[162] the Court of Appeal held that the common law (and 'fairness') required that the council explain how it had reached its decision. The reasons must not only be clear – they must be lawful and given in a timely way so that the individual concerned is able to exercise their right to seek a review of that decision.

Analysis: Application of the Law to the Facts

Billie is a 'child in need'. The local authority has a duty to assist her and her family to conduct a normal life.

Billie has special educational needs and these needs are being addressed positively at a school that has specialist provision of the kind she requires. In common with many people with autism, Billie has a need for a fixed daily routine.

A problem has arisen in relation to her travel arrangements. Although Billie's school is 3.5 miles away from her home, the local authority argues that there is an alternative school available within walking distance within her catchment area. Faced with the facts, a public body must act reasonably. It must act within its legal powers, consider all the evidence, not 'fetter its discretion' and above all safeguard and promote the best interests of Billie.

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

[156] Department for Education *Home to school travel and transport guidance Statutory Guidance for local authorities* July 2014.

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

[158] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[159] [1983] 2 AC 613, HL.

[160] 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.

[161] *Stefan v The General Medical Council (Medical Act 1983)* [1999] UKPC 10 at para 32.

[162] *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209.

Billie's mother has advanced material evidence that it would not be in her best interests to move her to a school that is closer.[163] In such circumstances it is incumbent upon the authority to consider this evidence and to provide cogent reasons as to why it is not prepared to exercise its discretion to provide short term support to enable her to remain at her current school. The explanation advanced by the local authority must also explain why it considers that such interim assistance would constitute an 'unreasonable adjustment' for the purposes of the Equality Act 2010.

Preliminary Conclusions

On the basis of the above analysis, our preliminary opinion is that:

1. The local authority has acted unreasonably by failing to provide cogent reasons for its refusal to exercise its discretion to allow Billie to travel on a school bus to her existing school, or to provide a loan or grant to her mother to enable her car to be repaired.
2. The local authority has acted unreasonably by failing to provide cogent reasons as to why it considers that interim assistance of the kind discussed would constitute an 'unreasonable adjustment' for the purposes of the Equality Act 2010.

Actions that must be taken

Given the above analysis, there would be grounds for requiring that:

1. The authority reconsiders the request by Billie's mother for interim assistance of the kind discussed and provides her with an urgent and reasoned response to this request, a response that complies with the authority's statutory and public law duties and addresses its specific obligations under the Equality Act 2010.
2. Pending the provision of the authority's response, it should consider making interim arrangements to enable Billie to attend her specialist school.

CLAIRE'S STORY

Main topics: *School transport for a child with a Statement of Special Education Needs (SEN)*

Claire is 10 and has learning difficulties for which she has a SEN Statement and attends the school named in that Statement. There is no mention of any other school in the Statement. The local authority responsible for Claire's SEN Statement is not prepared to pay for her transport costs to the named school as there is a closer school it considers suitable.

Summary of Facts

This advice concerns Claire who is ten years old. Claire has moderate learning difficulties and Developmental Coordination disorder. Claire attends Green School, which is the school named in her SEN Statement as being the suitable school for her. There is no mention of any other school in the Statement.

The local authority responsible for Claire's SEN Statement is not prepared to pay for her transport costs to the named school on the basis that that there is a closer suitable school to which it would be prepared to provide her with free transport. Claire's mother does not accept that the closer school is suitable and accordingly she has been paying the full cost of Claire's school transport for the past 3 years. Claire's mother would like to know whether the local authority should cover this cost.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Education Act 1996
Section 324(4) of the 1996 Act states (among other things) that the SEN Statement shall-

(a) Specify the type of school or other institution which the local education authority consider would be appropriate for the child.

[163] *E v London Borough of Newham and the Special Educational Needs Tribunal* [2003].

Relevant Case Law:

A LA v. S and others (2012)[164]

In this case the Court of Appeal held that where a school is named in Part 4 of the SEN Statement, then the local authority is responsible for the child's transport to and from the school in accordance with the Education Act 1996. This duty applied even if the local authority considered that there was a closer suitable school for the child.

R (M) v Sutton London Borough Council (2007)[165]

In this case the Court of Appeal held that the transport duty did not necessarily apply where more than one school was named in the Statement. In this case, one school was named in order to respect the parents' preference and another was named by the local authority which it considered equally suitable (and closer). This process enabled the local authority to impose a condition in the Statement that required the parents to pay for the transport costs to their preferred school.

Relevant Local Policy

The local authority responsible for Claire's SEN Statement has a 'Children and Adult Services (Home to School/ College Transport Policy)'. Paragraph 23 of this policy, states that where a decision is taken that a young person should attend a Special School, free travel will be made available to the nearest Special School, identified by the authority.

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so called *Wednesbury* rule).[166] A decision will be unreasonable if it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.[167] It follows that although local authorities may develop local policies, these must comply with primary and secondary legislation (ie an Act of Parliament or a Regulation approved by Parliament). Guidance issued by a local authority must not contradict, or undermine the law or fetter a discretion provided by the law.

Analysis: Application of the Law to the Facts

In accordance with the Education Act 1996 section 324(4) the relevant local authority has produced a SEN Statement for Claire. In part 4 of that Statement Green School is the named school. No other school is named in the Statement and the Statement contains no condition that the parents must pay for the transport costs to their preferred school.

On the basis of the information supplied, it follows from the case law noted above that the local authority must provide Claire with transport to Green School and must fund transport to that school.

Actions that should be taken

The Local Government Ombudsman has issued detailed information and guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[168] The guidance notes that an appropriate remedy may require a number of separate elements, and should be proportionate, appropriate and reasonable based on all the facts of the case. Remedies for an injustice should seek to put the person affected back in the position they would have been were it not for the fault and may include reimbursing (in full or in part) actual, quantifiable financial loss which has directly resulted from the fault, for example benefits not paid and any avoidable, reasonable expenses – and where appropriate interest on losses.

Given the above analysis, there are strong grounds for requiring that:

1. The authority should, immediately, agree to arrange and to fund Claire's transport to the school named in her SEN Statement;
2. The authority should refund the past payments made by Claire's mother in relation to Claire's school transport funding;
3. The authority should pay an additional sum to compensate her for the interest on the sums paid by Claire's mother and for her time and trouble in making these arrangements;
4. The authority should apologise for its failure to comply with its legal obligations.

[164] [2012] EWCA Civ 346 In upholding an earlier Upper Tribunal decision - *Dudley MBC v JS* [2011] UKUT 67 (AAC).

[165] [2008] ELR 123; [2007] EWCA Civ 1205.

[166] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[167] See for example *R0020(South Tyneside Care Home Owners Association & Ors) v South Tyneside Council* [2013] EWHC 1827.

[168] Local Government Ombudsman, 'Guidance on good practice: Remedies' (LGO 2014).

DYLAN'S STORY

Main topics: *School Transport for child with Statement of Special Educational Needs (SEN)*
Local authority failure to provide a suitably - trained escort

Also considered: *Equality Act duties (to make reasonable adjustments)*

Dylan is 11 and has a Statement of Special Educational Needs (SEN) which identifies his propensity to display frustration and challenging behaviour and entitles him to school transport and an escort. The lack of training of the escorts and the unfamiliarity of Dylan with the drivers has resulted in significant problems with the transport arrangements.

Summary of Facts

The advice concerns Dylan (aged 11) who has, as a result of a rare chromosome disorder, severe learning difficulties, attention deficit hyperactive disorder (ADHD) and autistic behavioural characteristics. As a consequence Dylan requires close adult supervision at all times to ensure his own safety.

Dylan has a Statement of Special Educational Needs (SEN) which identifies his propensity to display frustration and challenging behaviour and entitles him to school transport. The responsible local authority, which accepts that Dylan requires an escort while travelling (in addition to the driver) has delegated this transport to a private company. The transport arrangements have been unsatisfactory for a number of reasons, including:

- The length of the home–school journeys: these were taking 90 minutes each way – not because of the distance but because Dylan was the first child to be collected and the last to be dropped off;
- The escort being unaware of Dylan's needs and lacking the necessary skills to manage Dylan's behaviour;
- The escort not being known / introduced to Dylan prior to the first travel episode.

The consequences of these failings have been serious including:

- Dylan becoming stressed and anxious, triggering violent behaviour. This has resulted in Dylan harming himself, the transport vehicle and other children;
- Untrained taxi staff have had to use physical restraint on Dylan;
- Dylan frequently refusing to get into the taxi resulting in one of his parents having to take him to school – causing disruption to their employment.

A significant part of the problem has been caused by the local authority's failure to plan properly – for example:

- To carry out a risk assessment of the journey despite these needs and incidents being known to them;
- To shorten the journey (which they have done recently – so that Dylan travels alone and directly to his school)
- To ensure that during the summer break, new escorts meet with Dylan (so they are familiar to him) and are properly trained (so they have the skills to deal with his behaviour).

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989
For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families.

Services which should be provided for children living with their families are set out in Part 1 Schedule 2 Paragraph 8 and include, among other things, (d) facilities for travelling.

Carers (Recognition and Services) Act 1995

Where a disabled child is being assessed under the Children Act 1989, a local authority must inform that child's carer(s) (if providing a substantial amount of care on a regular basis) of their right to request an assessment of their ability to provide and to continue to provide care for the disabled child.[169] In undertaking such an assessment, the Act requires that the local authority consider the work commitments and aspirations of the carer(s).[170]

Equality Act 2010

The Equality Act 2010 section 20 places a duty on local authorities to make reasonable adjustments for disabled persons in the services they provide. This includes transport for children to school.[171]

Section 149 of the Act places a duty on local authorities to promote equality for (among others) disabled people and to eliminate discrimination.[172] When formulating policies and practices (for example arrangements for school transport) authorities are required to undertake an assessment (known as the 'Public Sector Equality Duty – 'PSED') of the likely impact these will have on people with protected characteristics, (for example disabled people). The courts have been strict in their interpretation of this duty.[173]

2014 Department for Education and Skills 'Home to School Travel and Transport Guidance' (see below) stresses at para 44 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 school transport difficulties. In his report[174] 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".

Education Act 1996

Section 508B of this Act provides that there is a duty on the local authority to put in place for eligible children, suitable travel arrangements to facilitate their attendance at school.[175] In the case of *R v Hereford and Worcester County Council, ex parte P*[176] the High Court held that local authorities were under a duty to ensure that children reached school without undue stress, strain or difficulty which would prevent them from benefiting from the education the school has to offer.

Guidance

Home to School Travel and Transport Guidance (2014)[177]

2014 Department for Education guidance (para 35) states that for arrangements to be 'suitable', they must 'be safe and reasonably stress-free, to enable the child to arrive at school ready for a day of study'. At para 44 it then states:

> All local authorities should ensure that all drivers and escorts taking pupils to and from school and related services have undertaken appropriate training, and that this is kept up-to-date. It is also considered good practice for those responsible for planning and managing school transport to have undertaken appropriate equality training. This training could consist of (but is not restricted to):
>
> - an awareness of different types of disability including hidden disabilities;
> - an awareness of what constitutes discrimination;
> - training in the necessary skills to recognise, support and manage pupils with different types of disabilities, including hidden disabilities and certain behaviour that may be associated with such disabilities;
> - training in the skills necessary to communicate appropriately with pupils with all types of different disabilities, including the hidden disabilities; and
> - training in the implementation of health care protocols to cover emergency procedures.

[169] Section 1(2B) Carers (Recognition and Services) Act 1995.

[170] Section 1(2C) Carers (Recognition and Services) Act 1995.

[171] Section 20 (3) applies 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."

[172] The English Government's Equalities Office has published a guide to assist public authorities to comply with their public sector duty under the Equality Act 2010 - Public sector: quick start guide to the public sector Equality Duty [June 2011].

[173] See for example, In *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) and *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin).

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

[175] For cases concerning school transport difficulties where this provision is particularly relevant see Harry's and Neville's stories in the 2013 Digest at www.law.cf.ac.uk/probono/cerebra_opinions.html

[176] [1992] 2 FCR 732.

[177] Department for Education *Home to school travel and transport guidance Statutory Guidance for local authorities* July 2014.

The [local authority's] Home to School and College Travel Policy (Oct 2014)

The responsible local authority has a travel policy which states that its aim is for each pupil to arrive at school safely in an alert and receptive state of mind. In achieving this, travel arrangements provided will be safe, healthy, comfortable, reliable and free from stress.

Other relevant guidance 'The Safety of School Transport'

Royal Society for the Prevention of Accidents (ROSPA) Guidance (2003)[178] provides guidance (among other things) for those intending on providing transport for children to and from school. It advises: that escorts (or passenger assistants) must have the necessary introduction to their duties; must be capable of exercising control over children; and should be qualified to provide for the needs of all passengers. In relation to operators it advises that they should ensure that the escorts are aware of their duties and that they have undertaken a risk assessment to decide whether an escort is required – taking in to account the journey and the needs of the passenger.

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so-called *Wednesbury* rule).[179] A decision will be unreasonable if it has, for example, been reached after ignoring relevant evidence or is simply irrational – for example it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.[180]

Analysis: Application of the Law to the Facts

Dylan is a 'child in need' for the purposes of the Children Act 1989 and as a consequence, the local authority has a duty to assist him and his family in helping him to conduct a normal life.

Dylan has a Statement of SEN and the local authority is under a specific duty to ensure that he is transported to and from his school and that this is done safely and with the minimum of stress.

The statutory and non-statutory guidance that the local authority should take into account (and indeed the principles of public law 'reasonableness') requires that it ensures that Dylan's drivers and escorts have been properly trained to cope with his specific disability related needs and behaviour – including appropriate training in the use of restraint procedures. The local authority is under a duty to undertake a PSED assessment to ensure that its transport arrangements do not impact negatively on disabled people and this should have identified the duty to make reasonable adjustments to ensure that Dylan's specific needs are addressed. This would, it appears, have included a risk assessment; a meeting between the escort and Dylan prior to the first school trip; and the escort having had training to support Dylan in the least restrictive way possible. None of these necessary actions appear to have been taken by the authority in this case. Accordingly its actions would appear to have been unreasonable and amount to maladministration.

Actions that should be taken

Given the above analysis, there would appear to be strong grounds for requiring that:

1. the family be given an apology for the maladministration that has characterised the authority's approach to this issue in the past;
2. the authority ensures that Dylan is familiarised with his driver and escort prior to the first journey with them; that the driver and escorts are trained appropriately to address Dylan's needs – and in particular in the use of restraint techniques – and to minimise the stress and harm he experiences;
3. the authority undertake a full PSED assessment of its procurement arrangements for school transport for disabled children;
4. the authority considers compensating the family for the cost of the school transport they have had to provide – when Dylan has refused to go with the transport provided by the authority – as well as for the general inconvenience and distress caused by the maladministration that appears to have characterised its actions in this case.

[178] The Safety of School Transport (2003) at www.rospa.com/roadsafety/info/schooltransport.pdf page 11-12.

[179] Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[180] See for example R (South Tyneside Care Home Owners Association & Ors) v South Tyneside Council [2013] EWHC 1827.

[181] For a precedent of a Freedom of Information Act request for a copy of the local authority's PSED assessment see Tom's Story in this Digest at page [XXXXXXX].

TOM'S STORY

NB awaiting transcript of *R (PP) v East Sussex CC* referred to in Paul Greatorex blog at http://www.education11kbw.com/

Main topics: *School transport – inflexible council policy concerning after-school clubs*

Also considered: *Public Sector Equality Duty Assessments (PSED)*
Precedent Freedom of Information Request for copy of PSED

Tom is 13 - years old and attends a school with specialist facilities and his local authority provides him with transport to and from that school. It has however refused to agree to change the collection time to accommodate the child's desire to attend after school clubs.

Summary of Facts

This advice concerns a 13-year old child, Tom, who attends a school with specialist facilities to meet his disability related needs. The local authority provides Tom with transport to and from school. It has however refused to agree to a request that it changes the collection time to accommodate the child's desire to attend after school clubs. Tom's parents are willing to provide transport for him on two days a week, but the authority has refused to agree to be flexible in its 'pick up' times for the other days. On these days Tom's parents have offered that the cost be limited to a mileage allowance for the journey. The authority has given its reasons for its decision in the following terms:

> The council does not consider paying for this additional transport would be reasonable … the local authority must provide this service in the most cost efficient way that fulfils the statutory duty and meets the transport needs of entitled pupils.
>
> The local authority is entitled to take into account the impact on the School Transport budget of the cost of making a similar adjustment for all pupils in [Tom's] position, and that it is not reasonable for those costs to be incurred at a time of severe budgetary restraint and that, for this reason, it is not reasonable to make the adjustment...

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989

For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families.

Schedule 2 Part 1 para 6 of the 1989 Act in addition places a duty on local authorities to provide services designed-

(a) to minimise the effect on disabled children within their area of their disabilities;
(b) to give such children the opportunity to lead lives which are as normal as possible; and
(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

Services which should be provided for children living with their families are set out in Part 1 Schedule 2 Paragraph 8 and includes 'facilities for, or assistance with, travelling to and from home for the purpose of taking advantage of any other service provided under this Act or of any similar service'.

Education Act 1996

The principal provisions that govern local authority responsibilities for making suitable school and travel arrangements for children are contained in Part IX Chapter II of the Education Act 1996. Section 508B[182] places a duty on English local authorities to put in place for eligible children suitable and free home to school travel arrangements, for the purpose of facilitating their attendance at school. Schedule 35B of the 1996 Act defines an eligible child as being one (having regard to – among other things – the child's disability) who cannot reasonably be expected to walk to school. The Courts have held that even where there is no duty to transport, local authorities have a power to do this and are accordingly under a duty to consider the use of this power in individual cases.[183]

[182] Inserted by Education and Inspections Act 2006.
[183] *A v. North Somerset Council* [2009] EWHC 3060 (Admin); [2010] E.L.R. 139

Equality Act 2010

The Equality Act 2010 section 20 places a duty on (among others) local authorities to make reasonable adjustments for disabled persons in the services they provide. This includes providing transport for children at a range of times, depending on their needs.

D v Bedfordshire County Council (2009)[184] concerned a local authority's refusal to provide after-school club transport in almost identical terms to the present case. The Court of Appeal held that the local authority was under a duty to consider its statutory non-discrimination obligations[185] to make reasonable adjustments – a duty that is now found in the Equality Act 2010, section 20.

Section 149 of the Act places a duty on local authorities to endeavour to eliminate discrimination, promote equality of opportunity and to foster good relations for (among others) disabled people.[186] When formulating policies and practices (for example arrangements for school transport) authorities are required to undertake an assessment (known as the 'Public Sector Equality Duty – 'PSED') of the likely impact these will have on people with protected characteristics, (for example disabled people). The courts have been strict in their interpretation of this duty.[187]

Public Law Principles

Duty to act reasonably

Public bodies must act reasonably (the so-called *Wednesbury* rule).[188] A decision will be unreasonable if it is, for example, pre-determined because the public body has a blanket policy that deals with the question. Public law also requires that in appropriate situations reasons should be given for a particular decision.

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* (1988)[189] 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.

Duty to Give Reasons

Although there is no general duty on public bodies to give reasons for their decisions, 'reasonableness' will require that they do give reasons where the interests of justice require. In such cases the reasons need not necessarily 'be elaborate nor lengthy. But they should be such as to tell the parties in broad terms why the decision was reached.' [190] In an analogous social care assessment case[191] the Court of Appeal held that the common law (and 'fairness') required that the council explain how it had reached its decision. The reasons must not only be clear – they must be lawful and given in a timely way so that the individual concerned is able to exercise their right to seek a review of that decision.

Analysis: Application of the Law to the Facts

Tom is a disabled child for the purposes of the Children Act 1989 and accordingly a child 'in need' for the purposes of s17 of that Act. It follows that the authority has a power/duty to provide for him travel assistance 'to and from home for the purpose of taking advantage of any other service provided under [the Children Act 1989] or of any similar service' (Schedule 2 Paragraph 8).

[184] [2009] EWCA Civ 678; [2009] E.L.R. 361.

[185] In relation educational establishments the duties under the Disability Discrimination Act 1995 were more limited than those under the Equality Act 2010 – in that the duty did not extend to the provision of 'auxiliary aids or services' (section 28G(3) of the 1995 Act). Nevertheless the Court of Appeal held that the duty to consider reasonable adjustments applied: Lord Justice Aikens (para 27) expressed considerable doubt as to whether 'anything to do with the transport to be provided could amount to an "auxiliary aid"' (see also Wall LJ at para 23).

[186] The English Government's Equalities Office has published a guide to assist public authorities to comply with their public sector duty under the Equality Act 2010 - Public sector: quick start guide to the public sector Equality Duty [June 2011].

[187] See for example, In *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) and *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin).

[188] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

[189] [1988] 3 WLR 113, CA.

[190] *Stefan v The General Medical Council (Medical Act 1983)* [1999] UKPC 10 at para 32.

[191] *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209.

The authority accepts that Tom is an 'eligible child' for the purposes of the Education Act 1996 section 508B, in relation to home to school transport. It however has refused to be flexible over this provision in relation to after-school club attendance. Its reasons can be broken down into the following parts:

1. The cost of the additional transport would not be reasonable.

   The local authority statement allows for no exceptions. On the face of it, in no cases will it make a reasonable adjustment or exercise its discretion, due: (a) to the possible consequence that it would have to make 'a similar adjustment for all pupils in [Tom's] position'; and (b) to the 'severe budgetary restraint' that the local authority is under. Both arguments are clear evidence of a blanket policy that makes resource constraints 'determinative': essentially no matter how unique; no matter how serious the consequences for Tom; no matter how small the cost – his individual circumstances will be sacrificed to a greater policy of 'non-payment'. Absent cogent evidence to the contrary this constitutes a fettering of the authority's discretion and a breach of its obligations under the Equality Act 2010. The local authority is not bound to fund the after-school transport, but it is bound to consider the facts carefully and reach a decision on the basis of Tom's individual needs.

2. The authority must provide this service in the most cost-efficient way that fulfils its the statutory duty.

   The above reason (for not paying any additional cost) is open to challenge on the grounds that: (a) a cost efficient way, may not be the cheapest way; (b) the authority is not obliged to fund only the 'cheapest' rate to meet an individual's needs – it has a power to pay more; and (c) as the local authority is under a duty to consider making reasonable adjustments – that duty may require it to pay more than the minimum.

Since the local authority is propounding a severe policy – essentially refusing to consider exercising a discretion / duty in relation to home school transport for disabled children, it would appear to be under a duty to have undertaken a PSED assessment of the impact of this policy.

In summary, the evidence provided suggests that the local authority has not considered Tom's individual needs (as a disabled child) for flexible transport arrangements and that it has applied a blanket policy, with the consequence that there is no scope for flexibility in home to school transport arrangements. In the absence of cogent evidence to the contrary, such a policy constitutes an unlawful fettering of the authority's duties and powers.

Actions that must be taken

Given the above analysis, there would be strong grounds for requiring that:

1. the authority review the request for assistance without delay (we would suggest, within 10 working days from being so requested by the family):

2. The authority should provide a copy of its PSED assessment of the fitness of the policy it is propounding for the purposes of the Equality Act 2010, section 149. If this is not forthcoming, then a Freedom of Information Act request could be submitted to obtain a copy – a precedent of such a request is annexed to this opinion).

NAME AND ADDRESS OF FAMILY

Local authority name and address

Date

Telephone/ email details

Dear Local Authority FOI Officer,

Freedom of Information Act 2000 Request
School transport for disabled children to attend after-school clubs

I request that you provide me with information (under the Freedom of Information Act 2000) regarding your local authority's policy on making reasonable adjustments to provide school transport to enable disabled children to attend after-school clubs.

I have grounds to believe that your local authority has previously decided that it is unable to make a reasonable adjustment, under section 20 of the Equality Act 2010, to a policy that does not allow the local authority to provide school transport after 15:10pm.

I request therefore that you provide me with information you hold concerning:

- your local authority's policy concerning the provision of school transport to enable disabled children to attend after school clubs;
- copies of all records of concerning discussions and/or meetings on this subject;
- any impact assessment undertaken in compliance with your public sector equality duty under section 149 Equality Act 2010 concerning your local authority's policy concerning the provision of school transport to enable disabled children to attend after school clubs;

If you have any questions about this request for information, please do not hesitate to contact me. I would like to thank you in advance for your assistance in responding to our request for information.

Yours sincerely,

(name)

BEN'S STORY

Main topics: *Parental rights in relation to a child 'accommodated' by the local authority.*

Ben is a 13 year old young person with autism who has been accommodated by the local authority for the last six months. Ben's mother's request to have greater contact with him has been ignored by the local authority.

Summary of Facts

This advice concerns Ben, a 13 year old young person with autism. Ben has been accommodated by the local authority for the last six months. Ben's mother would like him to come home for 2 hours a week in order to re-establish contact with him – and in the hope that if happy he might be able to spend longer periods with his family.

For the last three months Ben's mother has been asking, at social work meetings, for home visits to be arranged but nothing has happened: she feels she is being side-lined and wants to know where she stands legally. She has no documentation or minutes of meetings that she has attended.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989

For the purposes of the Children Act 1989, s17(10), a child is 'in need' if (among other things) he or she is disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families.

Children provided with accommodation by a local authority under the Children Act 1989, section 20, are referred to as 'accommodated children'. Section 20(1)(c) provides:

> every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of… the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

The courts have held that the word 'prevented' should be interpreted widely.[192] In a 2007 case, for example, it was held that a mother was 'prevented' from providing accommodation for her daughter where she had been assaulted by the daughter and the relationship had so badly broken down that she was not prepared to continue to accommodate the child.[193] In so deciding, the court expressed the opinion that serious ill health on the part of a mother and her inability to control her child would also be sufficient to 'prevent' the mother from providing accommodation.[194]

Local authorities are under a duty of care to undertake day-to-day care of such children when given voluntary consent by the child's parents. In the case of Bedford v Bedfordshire CC (2013), it was held that 'it is important to recognise that the section 20 regime depends on parental consent and is non-coercive'. Under such arrangements the parent retains full 'parental responsibility and may remove their child at any time from a local authority's accommodation (section 20(8)).

WF v. Anglesey County Council (2013)[196] concerned the failure of a local authority to return a child who had originally been placed by her mother under section 20. The court was 'highly critical' (para 27) of the local authority's disregard at key meetings of the mother's wishes, and in addition to declaring that its actions were unlawful, indicated that the mother would have a claim for compensation due to the local authority's unlawful action.

[192] See *R (G) v Barnet LBC* [2004] 2 AC 208.
[193] *R (L) v Nottinghamshire CC* [2007] EWHC 2364 (Admin).
[194] This view was accepted by Baroness Hale in a later House of Lords judgment (*R (M) v Hammersmith and Fulham LBC* [2008] UKHL).
[195] [2013] EWHC 1717 (QB).
[196] 21st November 2013 High Court (Fam) 3CJ00151 Transcript - HH Gareth Jones, sitting in the Mold County Court.

There is a duty on the local authority under s 22 (3) to safeguard and promote the welfare of the child who they are accommodating. This includes, under schedule 2 para 15, a duty to promote contact between the child and his parents.

Section 22(4) of the Act requires the local authority, so far as reasonably practicable to take into account the wishes and feelings of the child and of his parents when making any decision concerning a looked after child.

Children Act 1989 Regulations
The Care Planning, Placement & Case Review (England) Regulations 2010

These Regulations and the guidance[197] that accompany them, requires – among other things – that local authorities prepare a Plan for every looked after child and that the Plan must be kept under review. The Plan must be copied to the child's parents. The Plan must specify the arrangements for contact with the child's 'parents, siblings and other family members or significant others; whether these take into account the child's current wishes and feelings; and whether any changes are needed to these arrangements'.[198]

Section 25A Children Act 1989 requires that an Independent Reporting Officer (IRO) be appointed for each looked after child whose role is to monitor the authority's actions in relation to that child's Plan and to ensure that the authority complies with its obligations under the regulations. The plan is to be regularly reviewed; the *minimum* standard for the timing of reviews is within three months of placement, then at least every six months. Statutory guidance states that contact arrangements are a matter for negotiation and agreement between the parents and the local authority, and that the authority should ensure that the parents know where to get advice about this.[199]

Human Rights Act 1998

Section 6 of the 1998 Act makes it unlawful for a public body to act in such a way that it violates a person's 'convention rights'. 'Convention rights' in this context includes Article 8 of the European Convention on Human Rights which requires that public bodies show (among other things) respect for individuals' private and family life and that any interference with this right must be 'in accordance with the law' and serve a legitimate aim and not be disproportionate. In the case of *Kutzner v Germany* (2002)[200] – a case concerning children separated from their disabled parents – the European Court of Human Rights stressed the state's positive obligations to take measures to facilitate the family's reunion as soon as possible. In *Hillingdon LBC v Neary* (2011)[201] – a case concerning a young adult disabled person – the court held that a local authority had breached both the disabled person's and his parents' Article 8 rights by unlawfully separating them despite the repeated requests made by the parent.

Public Law Principles
Duty to act reasonably

Public bodies must act reasonably (the so-called *Wednesbury* rule).[202] A decision will be unreasonable if it is, for example: (1) based on irrelevant evidence; (2) reached after ignoring relevant evidence; (3) irrational – for example it is made in breach of the law or simply 'so unreasonable that no person acting reasonably could have made it'.

In the present context, matters that the local authority must have particular regard to include the above-cited Planning, Placement & Case Review Regulations and the guidance that accompanies them.

[197] Department for children, schools and families IRO Handbook Statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children (2010)

[198] See Department for children, schools and families IRO Handbook Statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children (2010) para 3.38 and The Care Planning, Placement and Case Review (England) Regulations 2010 SI No. 959 Schedule 7 para 4.

[199] Children Act 1989 Guidance vol. 2 Care Planning, Placement and Case Review (2010) para 2.91.

[200] (2002) 35 EHRR 25.

[201] [2011] EWHC 1377 (COP).

[202] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 – this is the case where the court first explained the extent of the duty on public bodies to act 'reasonably'.

Analysis: Application of the Law to the Facts

For the purposes of the Children Act 1989, section 20, Ben is a 'child in need' and an 'accommodated child'.

Because of Ben's difficulties his mother is prevented from caring for him. Although she is entitled to require his immediate return (and the cessation of the arrangement under section 20) this is not something she wishes to happen. Instead she wishes to have greater contact with him. The local authority is required to take her wishes and feelings into account and to address this need in Ben's Care Plan. It has failed to do this and it has failed to provide her with a copy of the Plan. In both respects the authority is – on the evidence we have been provided – in breach of the law.

It follows that the authority is also in breach of its obligations under Article 8 of the European Convention on Human Rights, in that its interference with Ben and his mother's family life (the failure to address the need for contact) is not 'in accordance with the law'.[203]

Action that Ben's mother is advised to consider

A formal complaint should be considered, concerning the failure of the local authority to address the request for increased contact with Ben. The complaint could require the local authority to: (1) provide a copy of Ben's Care Plan; (2) to provide the name and contact details of Ben's Independent Reporting Officer (IRO); and (3) to ensure that an early review of the Care Plan is convened.

Actions that must be taken by the local authority

Given the above analysis, there would be strong grounds for requiring that:

1. the family be provided with an apology for the delay and maladministration that has characterised the authority's approach to this issue in the past;
2. the local authority provide Ben's mother with: (a) copy of his Care Plan; (2) the name and contact details of his IRO; and (3) with an early date for a review meeting to consider the suitability of his Care Plan and the request for additional contact.
3. pending any review meeting with the IRO, the local authority should engage in urgent discussions with Ben's mother to ascertain whether contact of the kind she is seeking can be arranged on an interim basis.

GUY'S STORY

Main topics: *Duty on local authorities to provide copies of assessment and care plans*

Also considered: *Failure of local authority to provide adequate respite care*

Guy is 12 and has a number of impairments including an Autistic Spectrum Disorder, Attention Deficit Hyperactive Disorder, and a Moderate Learning Disability. Guy's mother is struggling to care for him and his disabled sister. Although the relevant local authority has visited and commenced an assessment of Guy's social care needs the authority has not provided any support or a copy of the assessment or his care plan, despite her requests.

Summary of Facts

The case concerns a 12 - year old child, 'Guy'. Guy has a number of impairments including an Autistic Spectrum Disorder, Attention Deficit Hyperactive Disorder, and a Moderate Learning Disability. Guy's mother is struggling to care for him, as she is in poor health (suffering with fibromyalgia, arthritis and depression). She also cares for her daughter who has also been diagnosed with a Moderate Learning Disability.

Over four months ago, the relevant local authority undertook an assessment of Guy's social care needs. During the assessment process Guy's mother made it clear that in order to be able to sustain her caring role she required breaks in the form of regular overnight respite care for Guy. The need for such breaks has been

[203] Department for children, schools and families IRO Handbook Statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children (2010) para 1.15.

supported by two doctors involved in the family's care – and their letters forwarded to the local authority. The authority has not provided Guy's mother with the support she needs nor a copy of the care plan for the respite care, despite her requests.

Guy's mother's condition is deteriorating and she believes that if she is not provided with the necessary support, she will have difficulty continuing to care for her two children.

The Relevant Law and Guidance

Statutory provisions and statutory guidance
Children Act 1989
For the purposes of the Children Act 1989, s17(10), a child is 'in need' if they are (among other things) disabled and s17(11) defines a 'disabled child' as one who has (among other things) a 'mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity'.

Section 17(1) of the 1989 Act places a duty on local authorities to safeguard and promote the welfare of children 'in need' within their area and (so far as is consistent with that duty) to promote the upbringing of such children by their families.

Schedule 2 Part 1 para 6 of the 1989 Act (Provision for disabled children) in addition places a duty on local authorities to provide services designed-

(a) to minimise the effect on disabled children within their area of their disabilities;
(b) to give such children the opportunity to lead lives which are as normal as possible; and
(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

Children Act Guidance
2013 English guidance on the Children Act 1989[204] requires that local authorities (after having completed an assessment) record their findings and decisions and inform, in writing, all the relevant agencies and the family of their decisions and of the plan for providing support. At para 57 the guidance states:

> The maximum timeframe for the assessment to conclude, such that it is possible to reach a decision on next steps, should be no longer than 45 working days from the point of referral. If, in discussion with a child and their family and other professionals, an assessment exceeds 45 working days the social worker should record the reasons for exceeding the time limit.

The timescale in Wales is detailed in 2001 guidance,[205] which allows a maximum of 35 working days (instead of the English 45 days) and notes that 'appropriate services should be provided whilst awaiting the completion' of the assessment. At para 3.13 the guidance also requires that at the conclusion of the assessment, 'the parent(s)… should be informed in writing, and/or in another more appropriate medium, of the decisions made and be offered the opportunity to record their views, disagreements and to ask for corrections to recorded information.'

Carers Acts
Where a local authority assesses the needs of a disabled child under the Children Act 1989, it is under a duty to offer his carers (if providing regular and substantial care) with a carer's assessment.[206] Carers' assessments must consider, among other things: the sustainability of the caring relationship; the ability of the carer to continue to provide care;[207] the carer's support needs;[208] and consideration of the carer's work, education, training and leisure needs.[209]

[204] Department for Education *Working Together to Safeguard Children* (March 2013) p.30.
[205] National Assembly for Wales *Framework for the Assessment of Children in Need and their Families* (2001) para 3.11
[206] Carers (Recognition and Services) Act 1995, sections 1(2) and 1(2B) and Carers & Disabled Children Act 2000, section 6.
[207] Carers (Recognition and Services) Act 1995 section 1
[208] Children Act 1989 s 17 ZD
[209] Section 2 of the Carers (Equal Opportunities) Act 2004.

Relevant case law

R v Barnet ex p G (2003)[210]

The House of Lords held that local authorities are under a duty to assess the needs of children 'in need' for the purposes of Children Act 1989, section17.

R v Islington LBC ex p Rixon (1997)[211]

The High Court noted that although there was no statutory duty to provide a person with a care plan, there was abundant official guidance concerning the importance of the assessment and care planning process. In the Court's view the care plan was 'at the centre of any scrutiny of the local authority's due discharge of its functions' – that:

> a care plan is the means by which the local authority assembles the relevant information and applies it to the statutory ends, and hence affords good evidence to any inquirer of the due discharge of its statutory duties'.

In a series of judgments, the High Court has held that care plans for disabled children must contain a 'clear identification of needs ... what [is] to be done about them, by whom and by when' and must 'set out the operational objectives with sufficient detail – including detail of the "how, who, what and when".[212]

National Service Framework (NSF) Guidance

Standard 8 of the National Service Framework for Children[213] (in England) requires that local authorities provide 'timely, appropriate, accessible and accurate information … to enable children and young people, parents or carers to make choices about the treatment, care and services they wish to use' (para 29). Guidance concerning the assessment of adults 'in need' places similar obligations on local authorities to provide copies of relevant documentation (ie assessments and care plans) – for example, the original (1991) assessment and care planning guidance,[214] the current English assessment and care planning guidance[215] as well as assessment and care planning guidance specifically targeted at older people.[216]

Public Law Principles

Duty to Give Reasons

Although there is no general duty on public bodies to give reasons for their decisions, 'reasonableness' will require that they do give reasons where the interests of justice require. In such cases the reasons need not necessarily 'be elaborate nor lengthy' but they should be such as to tell the parties in broad terms why the decision was reached.'[217] In an analogous social care assessment case[218] the Court of Appeal held that the common law (and 'fairness') required that the council explain how it had reached its decision. The reasons must not only be clear – they must be lawful and given in a timely way so that the individual concerned is able to exercise their right to seek a review of that decision.

Duty to act without delay

Where a statutory provision provides no timescale for the discharge of an obligation, the courts require that it should be done 'within a reasonable period'.[219] What constitutes a 'reasonable time' is a question of fact, depending on the nature of the obligation.[220]

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[210] [2003] UKHL 57, [2003] 3 WLR 1194.

[211] (1997–98) 1 CCLR 119 at 128, QBD

[212] See for example *R (AB and SB) v Nottingham City Council* [2001] EWHC Admin 235 and *R (J) v Caerphilly CBC* [2005] EWHC 586 (Admin).

[213] The Department of Health / Department for Education and Skills *National Service Framework for Children, Young People and Maternity Services Disabled Children and Young People and those with Complex Health Needs* (2004).

[214] Department of Health Social Services Inspectorate, Care Management and Assessment: *A practitioners Guide* (1991)at para 4.37.

[215] Department of Health *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care. Guidance on Eligibility Criteria for Adult Social Care, England 2010* at para 121; Welsh Government *Creating a Unified and Fair System for Assessing and Managing Care 2002 policy guidance* NAFWC 09/2002, para 2.49.

[216] Department of Health *The Single Assessment Process Policy Guidance*, (2002) annex E p24.

[217] *Stefan v The General Medical Council (Medical Act 1983)* [1999] UKPC 10 at para 32.

[218] *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209.

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

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

Analysis: Application of the Law to the Facts

Guy is a 'child in need' and in consequence the local authority is under an obligation to assess his needs for care and support – and those of his family, and in so far as any of these are 'eligible' needs, the authority must then construct a care and support plan to meet these needs.

While the local authority has completed the 'information gathering' stage of the assessment – it is unclear if it has made an eligibility determination and (if so) whether a care and support plan for these services has been constructed.

Given: (a) the strict assessment time limits imposed by the statutory guidance; (b) the obligation imposed by the guidance that families be advised of the outcomes of this process; (c) the substantial evidence provided to the local authority concerning Guy's mother's need for short break support (including the evidence from the doctors); and (d) the importance of the respite care support to Guy and his family, the local authority is under a statutory and public law duty to conclude (and provide full details of) the assessment and care plan in this case. The failure of the local authority to provide a timely decision, support and copies of the documentation would appear (in the absence of evidence to the contrary) to be unlawful and to constitute maladministration.

Actions that must be taken

In the case of *R v Sutton LBC ex p Tucker*[221] (which concerned the failure of a local authority to provide a suitable care plan) the High Court considered that it was appropriate to:

- make a mandatory order requiring the authority to provide within 21 days a care plan which complied with the relevant statutory guidance; and
- declare that the authority had acted unlawfully and in breach of the relevant guidance in (among other things) failing to produce a lawful care plan.[222]

The Local Government Ombudsman has issued detailed information and guidance aimed at promoting greater consistency in the remedies recommended by local authorities.[223] The guidance notes that an appropriate remedy may require a number of separate elements, and should be proportionate, appropriate and reasonable based on all the facts of the case. Remedies for an injustice should seek to put the person affected back in the position they would have been were it not for the fault and may include reimbursing (in full or in part) actual, quantifiable financial loss which has directly resulted from the fault, for example benefits not paid and any avoidable, reasonable expenses – and where appropriate interest on losses.

Given the above analysis, there are strong grounds for requiring that the local authority:

1. provide Guy's mother with details of the outcomes of her carer's assessment, the support services it has decided are appropriate to meet her eligible needs and the reasons for its decisions concerning her eligibility for services;
2. provide Guy's mother with details of the outcomes of Guy's assessment under the 1989 Act, the support services it has decided to meet his eligible needs and the reasons for its decisions concerning the eligibility for services;
3. provide Guy's mother with a detailed care plan explaining how her eligible needs will be addressed by a support package;
4. provide Guy's mother with a detailed care plan explaining how Guy's eligible needs will be addressed by a care and support package;
5. should apologise for its failure to comply with its legal obligations.

[221] (1997–98) 1 CCLR 251, QBD.

[222] See also *R (JF) v Hackney LBC* [2010] EWHC 3130 (Admin), para 39, where Calvert-Smith J made a mandatory order requiring the production of a lawful care plan within 14 days and provision of a range of services within 28 and 56 days.

[223] Local Government Ombudsman, 'Guidance on good practice: Remedies' (LGO 2014).

HOW CAN I STOP THE BULLIES?

A Guide for Parents with disabled children concerning the law and practice in England.

Prepared by the Cerebra Legal Entitlements Research Project (Summer 2014).

You might find this useful

- If your child is disabled
- If he/she is being bullied in school
- If you are unsure of what you can do to stop this
- If you are unsure of your child's legal rights

The following sections will tell you about:

1. Your child's right to an education.
2. The procedure to follow if he/she is being bullied.
3. The legislation, locally and nationally.
4. Two sample cases.
5. Websites where you can find further information.

Section 1 Does the state and/or the school have any responsibility for the education of my disabled child?

The Local Authority

The local authority is required to ensure education is provided for every child, and to have regard for the wishes of parents and children.

Special Educational Needs (SEN) are governed by Part 4 of the Education Act (EA) 1996. This can involve assessments, and a possible SEN statement. The process should follow the SEN Code of Practice.

The Local Authority must then ensure the needs are met for a child with a statement, and these needs cannot be restricted by local resources. For every child with SEN, the authority has a duty to promote the fulfilment of potential, and to safeguard and promote the welfare of all children.

The Governing Body

The Governing Body in a state school must ensure there are measures in place to identify children with SEN and that the school meets all identified needs. Schools are required to appoint Special Educational Needs Coordinators (SENCOs) to oversee this. Schools must also ensure that they make "reasonable adjustments" to accommodate the needs of disabled children (for example to ensure a safe environment). Guidance on what adjustments may be required by schools has been issued by the Equality and Human Rights Commission.[224]

Section 2 What does the law say about bullying in school?

State schools have a legal duty to promote the welfare and safety of all their students (EA 2002 section 175) and, since the Education and Inspections Act 2006 (section 89), head teachers are required by law to have a written behaviour policy which includes details of how bullying will be prevented.

Schools must also have a discipline policy which takes account of the needs of disabled pupils and complies with the safeguarding requirements of the Equality Act 2010. These policies should be readily available for parents, and are often found on a school's website.

Finally, since the Children Act 1989, a local authority must "safeguard and promote the welfare of children within their area who are in need *(which includes all disabled children)*."

To help schools tackle the issues around bullying, guidance has been published:

j) *Working together to safeguard and promote the welfare of children* (Department for Education 2013);[225]
k) *Preventing and Tackling Bullying* (Department for Education 2013);[226] and
l) *Supporting children and young people who are bullied: advice for schools* (Department for Education 2014).[227]

[224] Equality and Human Rights Commission Reasonable Adjustments for disabled pupils (2012) at www.equalityhumanrights.com/advice-and-guidance/education-providers-schools-guidance/key-concepts/reasonable-adjustments/ . The duty arises under section 20 Equality Act 2010.
[225] At www.gov.uk/government/publications/working-together-to-safeguard-children.
[226] At www.gov.uk/government/publications/preventing-and-tackling-bullying.
[227] At www.gov.uk/government/publications/preventing-and-tackling-bullying.

Section 3 What should I do if my child is being bullied?

A The first thing to do

The first thing to do is to talk about it. It pays to do all you can to keep open the channels of communication with the school. Your child may have already spoken about the bullying to the class teacher or form tutor, head of year or the SENCO, but if you have concerns, make an early appointment to speak to one of these yourself.

It would help to take with you any details your child can provide of the incidents of bullying, with names, dates etc if possible. Keep notes of the conversations at school, with dates and agreed action points. It often helps if someone else accompanies you to this meeting, to make the notes. Agree on a date when you and the school can give each other a progress check. Schools must take bullying seriously, and often a verbal reprimand to the bullies, accompanied by a letter to their parents, will suffice.

B If the bullying continues

If the bullying continues you can make an appointment with the Head Teacher. Take with you the details of any earlier meeting(s) and notes of further bullying incidents since then, with names, dates, where it happened, witness statements etc. If necessary, refer to the school's Behaviour Policy and Discipline Policy. The Head Teacher has ultimate responsibility for school discipline and for setting an acceptable behavioural standard. Matters should be resolved at this stage, but you can ask to be informed of the outcomes of your visit, by an agreed date and in writing. You may wish to summarise the content of this meeting afterwards, in a recorded letter to the Head.

C What if involving the Head fails to stop the bullies?

Ask to see the school's complaints policy, again often available on the website. You can then follow this policy and write to the governing body to complain, clearly detailing the action you have taken to date.

The complaints policy must contain contact details, the procedure and timeframe. You can ask to see your child's record, and any notes taken at meetings which may bear your child's name.

You may be asked to present your complaint to a sub-committee of governors who will decide what further action is required.

D Is that the final step I can take?

You can complain next to a higher authority than the governing body if you continue to be dissatisfied, by writing a letter of complaint to the local authority. However, authorities see bullying in school as an internal management issue and are reluctant to get involved. They do have a power to intervene if they feel there is a wider, continuous breakdown of discipline in a school, where they feel the behaviour of some pupils is prejudicing the education of others.

E A complaint can be made to the Ombudsman

A complaint can be made to the Local Government Ombudsman but only when all other stages (A-D above) have been completed and (generally) within 12 months of your first complaint to the school.[228] The Ombudsman will only get involved if there is evidence that the school and the local authority have acted unreasonably (referred to as 'maladministration') and that this has resulted in an injustice to you or your child. Unreasonable action might be that the authority took too long to respond to your complaint, did not comply with its own policy, or did not take appropriate action etc.

F The final stage

The final stage would be a complaint to the Department for Education (or if the school is an academy or free school, the 'Education Funding Agency'), but only when all other stages (A-D above) have been exhausted. If you wish to make such a complaint, you should include all relevant documentation with your letter, and detail the action you have taken to date.[229]

G What might happen when my child goes back to school?

If you are satisfied that the matter has been resolved, and if your child is comfortable about returning to school, you can request progress meetings with the form tutor or class teacher after two weeks perhaps with another after a further four weeks if all appears to be going well. Many schools will have "back to school" procedures in place for long-term absentees. These might include regular meetings for your child with a SENCO or a staff mentor, and/or the allocation

[228] For details of the Ombudsman process see http://www.lgo.org.uk/schools/

[229] Details of the procedure are provided at www.gov.uk/complain-about-school.

of a student "buddy" for your child. Do check if your child needs to catch up on any schoolwork, and ask what you can do to help your child at home, if appropriate.

Section 4 Is it possible to take legal proceedings?

Courts are reluctant to intervene in local authority disputes and consider that legal action should be the very last resort. Nevertheless, local authorities can, in severe cases, be liable for damages where a child has suffered harm or mental injury as a result of a school's failure to take reasonable steps to combat bullying. Legal advice for such a court claim would be required at an early stage (as there are time limits – in some cases quite short limits – for the commencement of proceedings). Legal proceedings for damages may involve a claim that (for example) the school was negligent, was in breach of its obligations under the Human Rights Act 1998 and/or the Equality Act 2010 (see below).

In addition, it is possible that action against bullies could be taken under criminal law, for example for 'assault' or under the Protection from Harassment Act 1997.

Relevant legislation includes:

The Equality Act 2010 section 19 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.'[230] There is substantial evidence to indicate that disabled children are more likely to experience bullying than non-disabled children. A failure by a school to take bullying seriously and to respond to it with effective action is therefore likely to have a disproportionate impact on disabled children.

Section 20 of the 2010 Act requires (amongst others) that local authorities make "reasonable adjustments" for disabled students, and this would include particular provisions in the school's behaviour policy to meet the needs of disabled children. Section 149 of the Act places a duty on local authorities to promote equality for (amongst others) disabled children and to 'eliminate discrimination, harassment, victimisation' (ie bullying). Proceedings can be taken under the Human Rights Act 1998 section 7 where it is believed that a local authority has failed to protect a person's rights under the European Convention on Human Rights. Such a failure could arise under Article 3 or Article 8 of the Convention (freedom from degrading treatment and right to respect for private life, respectively).

In determining what action a school should take, the courts may also have regard to the United Nations Convention on the Rights of the Child which states that 'A child with a disability has the right to live a full and decent life in conditions that promote dignity, independence and an active role in the community' (Article 23) and that 'Discipline in schools must respect children's human dignity' (Article 28).

Two sample cases

A Petra's Case

Petra is 9 years old and has autism, a moderate learning disability and anxiety. She has been bullied in school by other pupils on a number of occasions, physically and emotionally. On one occasion she was threatened by a pupil warning his older brother was going to "come to beat her up." Petra became increasingly distressed and unwilling to go to school.

Her parents contacted the class teacher and head teacher, but felt their concerns were not treated seriously. They persuaded Petra to return to school, but a further incident occurred, after which Petra's father collected his distraught daughter from school. She now refuses to return and her parents are concerned about her education, yet fear for her safety at school.

What are her rights here?

- The school has a duty of care and must ensure Petra is safe.
- The school must have a Behaviour Policy and Discipline Policy in place.
- The school should investigate all reported incidents very thoroughly.
- The Local Authority has duties towards a "child in need" and must provide support as identified in any assessment, at home if the school setting has becomes too stressful.

[230] 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.

What should Petra's parents do?

Follow the procedure outlined in A-D of section 3 above. As they have already spoken to the Head Teacher, they might now write a formal letter to the governing body, following the school's complaints procedure, and referring to the school's policies on behaviour and bullying. They should include any details of the meetings held at school, copies of any notes made and any action points agreed with the Head. They may wish to remind the governing body that a failure to deal adequately with a bullying complaint made by a disabled child may classify as indirect discrimination and thus a failure under the Equality Act 2010 section 19 as well as under section 20 if a 'reasonable adjustment' has not been considered. The governing body could also be in breach of its public sector equality duty under section 149.[1]

If this does not resolve the matter, then a formal letter could be sent to the local authority. Further to that, they may wish to seek legal advice (see note above concerning legal proceedings).

B Jack's case

Jack is 11, with Fragile X syndrome. He attends a mainstream school, and has SEN. He enjoyed Primary school, but has difficulties at the secondary school named in his SEN Statement, and has experienced many incidents of bullying, physical and emotional. He is now reluctant to attend school, having been cornered by a group of boys and verbally abused. Jack's parents feel the school has not responded appropriately. In fact, a request to meet the Head Teacher was denied, and his parents are concerned that he is neither receiving adequate support at school, nor help at home from the speech and language therapists recommended in his statement.

What are Jack's rights here?

- The local authority has a legal duty to meet Jack's needs.
- The duty to implement the SEN support is owed irrespective of the setting and not subject to resource restrictions.
- There is also a duty under the Education Act (1996) to safeguard and promote the welfare of all children.
- The school has a duty of care for Jack's safety
- The school has to have a Behaviour and Discipline policy in place.
- The Head Teacher carries ultimate responsibility for pupil behaviour.

What should Jack's parents do?

Jack's parents should get a copy of the school's Behaviour and Discipline policies, and familiarise themselves with its complaints procedure. They should write a formal letter to the governing body, following the outline provided in the complaints policy. They should include details of what they have done so far, mention the fact that the Head refuses to see them, and include any factual evidence or witnesses to the bullying incidents. The governing body has a legal responsibility to ensure the school complies with its policies, and will take seriously any misconduct of the Head Teacher.

If this still does not result in a positive improvement for Jack, the parents might write formally to the local authority, including all relevant facts with dates etc, and referring to the statutory duties required of an authority towards a "child in need." Further to that, they may wish to seek legal advice (see note above concerning legal proceedings).

Section 5 Where else might I find help?

Here are some useful websites which offer anti-bullying advice:

1. Respecting others: anti bullying guidance circular 23/03
2. "Preventing and tackling bullying" DfE advice (2013) at www.education.gov.uk
3. "Bullying at school" at www.gov.uk
4. Anti-bullying alliance at antibullyingalliance.org.uk
5. Contact a Family at cafamily.org.uk
6. Beat Bullying at beatbullying.org
7. Bullying UK at bullying.co.uk
8. Childline at childline.org.uk
9. Kidscape at kidscape.org.uk
10. National Bullying Helpline. at nationalbullyinghelpline.co.uk
11. IPSEA at www.ipsea.org.uk
12. ACE at www.ace-Ed.org.UK
13. MENCAP at www.mencap.org.uk
14. National Autistic Society at www.nas.org.uk
15. Local Safeguarding Children's Boards at www.safenetwork.org.uk
16. Stop Hate UK at www.stophateuk.org

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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, 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 in 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

Notes

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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