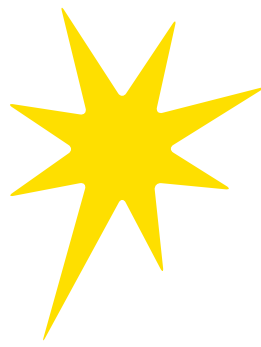


# Social Care in Wales

A Guide for Parents



# Working wonders for children with brain conditions

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# Introduction

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This guide has been prepared for parents of disabled children in Wales who want to know how to get help for their child's social care needs. It principally deals with the responsibilities of local authorities to provide social care for disabled children, as well as support for the parents/carers of those children. It has been updated to reflect the changes introduced by the [Social Services and Well-being \(Wales\) Act 2014](#), which came into force on 6th April 2016 and creates a new and distinct legal framework for social care in Wales, which will have a profound impact on the way social services are delivered.<sup>1</sup>

Local authorities have a duty to assess the care and support needs of disabled children. A failure to carry out such an assessment will generally be unlawful. Moreover, once such an assessment has been carried out, local authorities have a duty to provide the services that are necessary to meet the care needs of the disabled child concerned. Again, a failure to provide such services will generally be unlawful. Whilst that is what should happen, the reality may be different, and this guide is intended to help parents of disabled children to understand their legal rights and entitlements. This guide, however, is not intended to be legal advice, and should not be relied on as such. Where particular issues arise, parents should always take specific, independent legal advice from either a specialist helpline, an advocacy service or a solicitor. Details can be found in the Resources section on 2.

Against that general background, this guide covers the following areas:

**1. The basics.** An overview of the key responsibilities of local authorities to provide social care for disabled children, including some of the "general principles" which govern local authorities' decision-making processes in this area.

**2. When might my child be entitled to additional services?** This section explains the circumstances in which the law will consider a child to be in need of care and support from his or her responsible local authority.

**3. The assessment process.** This section deals, in particular, with the circumstances in which local authorities have a duty to assess the social care needs of disabled children, as well as the needs of the parents who care for such children. It explains the form which such assessments will take, including their timescale. It also addresses the application of eligibility criteria by local authorities to determine whether care should be provided.

**4. What can local authorities do for us?** A detailed guide to the social care services which local authorities can provide, the circumstances in which they are available and whether local authorities may charge for those services. It also provides a detailed explanation of "short breaks", a particularly important service that local authorities can provide to give respite to those caring for disabled children.

**5. Direct payments.** This section provides details about how parents/carers can arrange care services for disabled children themselves, by asking to be paid directly by their local authority.

**6. Care and support plans.** This section provides information on the way in which a disabled child's care needs should be recorded by a local authority.

**7. The Equality Act 2010 and social care services.** This section explains how the Act, which protects disabled people from discrimination, will be relevant to families when receiving (or seeking) social care services.

**8. Complaints.** This section provides an outline of the options available to parents who are unhappy with any aspect of their local authority's social care provision.

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<sup>1</sup> Part 3 Code of Practice (assessing the needs of individuals), para 9

**9. Glossary.** This section contains definitions of certain key legal terms used in the social care context, which are highlighted in blue throughout this guide.

**10. Resources.** This section provides some helpful resources for parents who are interested in finding out more detail about the law in this area.

## I. The Basics

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### 1.1 When might my child have a right to additional care and support under the Social Services and Well-being (Wales) Act 2014?

If your **child** may need care and support, in addition to, or instead of, the care and support provided by your family, then local authorities must assess his or her needs.<sup>2</sup> The duty applies regardless of the amount or type of support needed, or the financial means of the child or any person with parental responsibility.

In relation to **disabled** children, there is a presumption that such children have needs for care and support in addition to, or instead of, the care and support provided by the child's family.<sup>3</sup>

### 1.2 What is the legal basis for the "duty to assess"?

A local authority's duty to assess a child's care and support needs arises simply where it appears to a local authority that a child may have such needs in addition to, or instead of, the care and support provided by the child's family.<sup>4</sup> This assessment must entail:

- Assessing the developmental needs of the child;
- Identifying the outcomes that the child wishes to achieve, and the child's parent(s) wishes the child to achieve;

- Assessing what level of care, support, services, information, advice or assistance could help achieve those outcomes;
- Assessing whether other matters could contribute to achieving those outcomes;
- Taking account of any other circumstances affecting the child's well-being.<sup>5</sup>

As set out above, a **disabled child** is automatically presumed to have such care and support needs and must therefore have their needs assessed.

More information is given below on both the duty of assessment and the services that may be provided as the result of such an assessment.

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<sup>2</sup> Social Services and Well-being (Wales) Act 2014 Section 21(1)

<sup>3</sup> S21(7)

<sup>4</sup> S21(1)

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<sup>5</sup> S21(4)(a)-(e)

## 1.3 General principles

The law governing the responsibilities of local authorities in the field of social care is complex, and can be confusing. Where specific issues arise, you may need to obtain specialist advice. Details of organisations that work in this area and which can provide more detailed information and advice are set out in the [Resources section on page 39](#). However, you might find it helpful to keep in mind the following general points:

- You do not have to request an assessment of your child's needs as the assessment obligation will be triggered by the 'appearance of need'.<sup>6</sup>
- You have the right to be involved in your child's assessment.<sup>7</sup>
- You have a right to receive a written copy of your child's (or your own) assessment.<sup>8</sup>
- Importantly, parents also have an independent right to an assessment of their own needs for support (a [carer assessment](#)) where it appears to a local authority that a [carer](#) may have such needs<sup>9</sup> (see [section 3.17 on page 21](#) for more detail regarding the carer assessment).
- The views of both parents of a child who may need care and support, and of the child themselves, are of central importance to any decisions to be made about the care and support which should be provided by local authorities. Difficult issues may arise where such children nonetheless have the capacity to make decisions in their own right. Generally speaking, the law assumes that children under 16 are not able to make decisions for themselves, in which case decisions will be taken on their behalf by individuals with [parental responsibility](#). However, this is not necessarily

straightforward, since the law also allows children who have sufficient understanding of the implications of a particular decision (e.g. to receive medical treatment) to take decisions for themselves. Moreover, there may be situations in which disabled children wish to have access to support from a local authority on a confidential basis, or are unwilling for their parents to disclose information to a local authority without their consent. The legal and practical issues which arise in relation to capacity and confidentiality are far from straightforward. However, certain key aspects of the law in this area are explained in more detail in our parent guide on [Decision-making, Confidentiality and Sharing Information](#) (see the [Resources section on page 39](#)).

More generally, since local authorities are **public bodies**, the law places them under a number of **general duties**, including:

- A duty to act reasonably and fairly, which involves (among other things) giving logical and appropriately detailed reasons for their decisions, acting without unnecessary delay, acting in accordance with any published policies and honouring any promises or commitments they may have made unless there is good reason to depart from doing so.
- A duty to comply with the law, including both specific legislation in the field of social care, and more general pieces of legislation such as the [Human Rights Act 1998](#).
- Importantly, the law to which local authorities are subject also includes the [Equality Act 2010](#) (see page 31). This is highly relevant in the context of disabled children, since disability is a "protected characteristic" under the Equality Act, meaning that local authorities are not entitled to discriminate between disabled and non-disabled children, for example in the provision of services. Moreover, in relation to [disabled children](#) specifically, local authorities are required to make "reasonable adjustments" in cases

6 S21(1)

7 S21(5)(b)

8 The Care and Support (Assessment) (Wales) Regulations 2015 Reg 6(2)

9 S24(1)

where disabled children would otherwise be placed at a substantial disadvantage in accessing public facilities or services.

- Under the Social Services and Well-being (Wales) Act 2014 (from now on referred to as the 'Act' in this guide), local authorities must now have 'due regard' to the United Nations Convention on the Right of the Child<sup>10</sup> and the Convention on the Rights of Persons with Disabilities<sup>11</sup> (see [Resources section on page 39](#)).

Further general principles governing the approach which should be taken by local authorities are set out in the National Service Framework (NSF) for Children, Young People and Maternity Services, which was published by the Welsh Government in 2005. This sets out a series of standards, including standards 'Universal to all Children', as well as key standards in relation to specific services and settings, namely:

- Child and Family Centred Services;
- Maternity Services;
- Children and Young People with Mental Health Problems and Disorders;
- Disabled Children and Young People;
- Children and Young People in Special Circumstances; and
- Acute and Chronic Illness or Injury.

While these standards are markers of good practice rather than formal legal requirements, they provide a useful indication of what is expected of local authorities, and (since they have been issued by the Welsh Government) they must be taken into account by local authorities when making decisions or developing policies concerning children. The [Resources section on page 39](#) gives further information.

## 1.4 Social Care and Individual Education Plans (Additional Learning Needs)

In some (though by no means all) cases, **disabled children** will also have additional learning needs. The rights of disabled children to special support (and in appropriate cases to an Individual Education Plan) is covered in a separate parent guide, [Education in Wales](#) (see the [Resources section on page 39](#)).

## 1.5 Practical tips

Remember that you bring an expertise that professionals working with your child do not have. The guidance makes clear that you and your child are equal partners in your relationships with professionals in the assessment process<sup>12</sup>. You know your child very well and you know how your child's disability and/or health care condition affects both your child and other members of your family. You should be involved in assessments of your child's social care needs and related meetings, such as reviews of your child's care plan. You may also receive a [carer's assessment](#).

In order to prepare for such meetings and assessments you might find it helpful to:

- Make a note of the discussions that you have with practitioners about your child's health and
- well-being, for example confirmation of your child's diagnosis
- Keep all relevant papers together in one place (this might include for example, letters you receive from health, social care and other practitioners, copies of your letters to such professionals concerning your child and notes of your discussions with them)

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10 S7(2)

11 Part 2 Code, para 67

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12 Part 3 Code, para 13

Prior to an important meeting or assessment of you or your child, make a note of the points that you want to discuss. These might include:

- your child's needs and aspirations (what your child is able to do, what s/he is not able to do and what might help to enable your child to achieve his or her aspirations)
- your caring role and its impact on you and your family (how much care you provide and how often; whether this is impacting on your health, ability to work, see friends, spend time with other members of your family; whether you have any financial concerns)
- how other members of the family are affected by your child's disability
- what you want to happen as a result of the meeting, including the timescale and who is to do what, and clarifying whether past undertakings have been completed, and if not, why not, and when these will be completed.

During the meeting, try to keep a note of all key statements and promises – especially who has agreed to do what and when – and any outstanding questions. Then email or post a letter to the person in charge of the assessment, confirming these points and raising any questions that are of concern to you.

Remember that local authorities are under a duty to provide people in need and their carers with information about the care and support that is available in their area. The duty includes information about:

- how the local care system operates;
- the choice of types of care and support, and the choice of providers in the local authority's area;
- how to access the care and support that is available; and
- how to raise concerns about the safety/well-being of a person (adult or child) who has needs for care and support.<sup>13</sup>

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13 S17; Part 2 Code of Practice (General Functions) para 295

## 2. When might my child be entitled to additional services?

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Local authorities must promote the well-being of people who need care and support and carers who need support.<sup>14</sup>

'Well-being' can mean well-being in relation to any of the following:<sup>15</sup>

- Physical and mental health and emotional well-being;
- Protection from abuse and neglect;
- Education, training and recreation;
- Domestic, family and personal relationships;
- Contribution to society;

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14 S1(3)(a) and S5  
15 S2(2)

- Securing rights and entitlements;
- Social and economic well-being;
- Suitability of living accommodation.

In addition, for a child, 'well-being' also includes:<sup>16</sup>

- physical, intellectual, emotional, social and behavioural development;
- 'welfare' as defined in the Children Act 1989.

Also, for an adult, 'well-being' also includes:<sup>17</sup>

- control over day-to-day life;
- participation in work.

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16 S2(3)  
17 S2(4)



If your child is a [disabled child](#), your local authority may be required to provide additional social care services and support. This is because local authorities have specific duties towards all children in their area who appear to be in need of care and support in addition to, or instead of, the care and support provided by the child's family.<sup>18</sup> For disabled children the position is even stronger, as all children who are disabled are presumed to need care and support in addition to that provided by their family.<sup>19</sup>

The key piece of legislation setting out local authorities' duties in this area is the [Social Services and Well-being \(Wales\) Act 2014](#).

## 2.1 What is the legal definition of a disabled child?

Although the Act does not rely on reference to 'disability', the term 'disabled' does become relevant for the carer of a disabled child. There is a duty on local authorities to assess the needs of carers who are providing or intending to provide care for a disabled child.<sup>20</sup> In this situation the definition for a 'disabled child' is that found in the [Equality Act 2010](#). Under the Equality Act, your child has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.<sup>21</sup>

A potential problem with using the Equality Act 2010 definition of a disabled child is that the relevant regulations exclude those with 'a tendency to physical... abuse of other people'.<sup>22</sup> However, the courts have indicated that this does not apply to disabled children where the behaviour is a symptom of an underlying impairment (such as as autism or attention

deficit disorder, etc.).<sup>23</sup>

Therefore, should a local authority attempt to exclude a parent carer from receiving support on the basis that the disabled child has a tendency to physically abuse other people it could be subject to a complaint to the Public Services Ombudsman for Wales or legal action. Specific legal advice should be sought in this situation.

## 2.2 How will my local authority determine whether my child needs additional support?

In order to ascertain whether additional care and support is required to meet your child's (and your family's) needs, the local authority will need to carry out an assessment of those needs. [Section 3](#) explains the circumstances in which such an assessment will be carried out and the process which local authorities will follow.

Care and support can be provided not only to your child but also to any members of your family<sup>24</sup> if that will assist your child. For example, it is recognised that providing services which can be regarded as meeting the needs of parents (e.g. by "short breaks" or respite care) is often an effective way of promoting the welfare of children, in particular disabled children. [Carers assessments](#) are considered separately on [page 19](#).

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18 S21(1)

19 S21(7)

20 S24

21 Equality Act 2010 S6(1)

22 The Equality Act 2010 (Disability) Regulations 2010, regulation 4

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23 C & C v. The Governing Body of a School (2018) UKUT 269 (AAC)

24 S34(1)(c)

# 3. The assessment process

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This section seeks to answer some of the key questions which parents are likely to have in relation to the assessment process for disabled children's social care needs.

## 3.1 An overview of the assessment process

The assessment process can be broken down as follows:

- First, a local authority must carry out an assessment if a child 'may' have a need for care and/or support.<sup>25</sup>
- Second, having completed the assessment, if the authority is satisfied that the child has needs for care and/or support, then the authority must decide if any of these needs meet the **eligibility criteria**.<sup>26</sup>
- Third, if the child's needs meet the eligibility criteria, then the authority must meet those needs by providing assistance in a variety of ways.<sup>27</sup>

## 3.2 What is the purpose of an assessment?

The purpose of an assessment is to find out whether your child needs care and support; what, if any, social care services and support should be provided to meet those needs;<sup>28</sup> and who is best placed to provide them.

Although in most cases the local authority itself will be responsible for co-ordinating the assessment, it is likely that other agencies will be involved, such as health and education.

## 3.3 What information must be recorded in the assessment?

Assessments must record a certain amount of information as a minimum when an individual's needs are deemed to be eligible and a care and support plan (or a support plan for a carer) is required. The Core Data Set<sup>29</sup> comprises the following:

- NHS number
- Title
- Surname
- Forename(s)
- Preferred name
- Address and postcode
- Date of birth
- Telephone
- Email address
- Sex
- GP name and address
- School name and address
- Occupation
- What other assessments have been undertaken by agencies?
- Preferred language/communication method/accessibility requirement
- Name(s) of carer(s)/people with **Parental Responsibility**
- Relationship
- Contact details for carer(s)/people with Parental Responsibility
- Is this a child on the Child Protection Register?
- Contact details of Lead Assessment Co-ordinator

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25 S21(1)

26 S32(1)(a)

27 S34

28 S21(1)(b)

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29 Part 3 Code, para 59

- Contact details of Lead Care Co-ordinator
- Information taken by (name)
- Organisation
- Date

**Section 3.9 on page 13** sets out what is required in an assessment in greater detail.

## 3.4 How can I request an assessment of my child's needs?

You no longer have to request an assessment of your child's needs. The local authority must assess your child simply on the appearance of need.<sup>30</sup> This is a new development under the Act, as there was no explicit statutory duty to assess under previous legislation. In relation to disabled children, there is a presumption that they have needs for additional/substitute care and support so the authority must carry out an assessment automatically. The duty applies regardless of the amount or type of support needed, or the financial means of the child or any person with parental responsibility.

If no assessment has taken place and you think your child ought to be assessed, then you should contact your local authority by phone or in writing (by email or post) asking for an assessment of the needs of your child and your family. Alternatively, you could ask a professional involved in the care of your child, such as your child's GP, to make the request to the local authority on your behalf. In either case, you should explain what problems you are having and what you would like help with (and if possible, the kind of help you would like to have). You should address your request to your local authority's Children's Services department (bearing in mind that the department may have a slightly different name depending on the local authority where you live).

You should be able to find the contact details in your local telephone directory or on the internet (the local authority should have the contact details on its website).

The letter to the local authority should explain that your child has a disability, giving details of what that disability is (including any diagnosis that your child has been given). If you have written confirmation of your child's diagnosis, include a copy of this with your letter. Your GP should be able to provide confirmation of your child's condition.

You should explain that you have been advised that, given your child's disability, s/he is a child in need of care and support under section 21 of the Act and that this means that your child has a right to an assessment of his/her needs.

Although there appears to be no statutory requirement that the local authority state whether it will carry out an assessment, public law principles require that it must inform you without delay whether it will do this (and if not, why it considers it unnecessary). You should include in your letter the date on which you want a response to your request, giving your contact details (address, phone number, email address, etc.). Put this date in your diary and be prepared to telephone the local authority if you have not received a reply.

## 3.5 Does my local authority have to carry out an assessment?

The legislation states that local authorities must assess children in need of care and support. As set out above, this duty is triggered on the appearance of need.<sup>31</sup> Disabled children are automatically presumed to need care and support in addition to, or instead of, the care and support provided by their family.<sup>32</sup>

30 S21(1)

31 S21(1)

32 S21(7)

Accordingly, if your child is disabled, the local authority must carry out an assessment to identify his or her needs and those of the family more broadly. If you are writing to request an assessment, make sure you explain why you consider that your child has needs for care and support and/or confirmation that your child has a disability.

### 3.6 Can my local authority refuse to carry out an assessment if my child does not have a medical diagnosis?

A local authority cannot refuse to carry out an assessment in the absence of a medical diagnosis. This is because there is a duty on authorities to assess any child who appears to have needs for care and support. Although a disabled child is presumed to need care and support in addition to that provided by the child's family<sup>33</sup> and therefore is automatically entitled to an assessment, this does not exclude a child without a diagnosis from the right to an assessment. There is therefore no requirement for a medical diagnosis to be presented before an assessment is carried out.

If there is any difficulty in establishing that a child may have needs for care and support, then having a medical diagnosis from your GP or other medical professional may well be helpful in encouraging your local authority to carry out an assessment of your child's needs. A clear statement from a medical professional of your child's disability will establish the presumption of need for care and support, and will often be invaluable in getting the right support at the right time.

An unreasonable refusal to carry out an assessment may well provide grounds for a complaint, or even legal action (see section 8 on page 35).

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33 S21(7)

### 3.7 What about assessments of additional learning needs (ALN)?

There is a specific duty for local authorities to carry out an assessment of the additional learning needs of a child, in any case in which the authority is of the opinion that the child may have such needs. More guidance on when a child will be regarded as having a learning difficulty or disability for these purposes is given in our [Education in Wales](#) guide (see [Resources section on page 39](#)).

### 3.8 Is there any government guidance on assessments?

There are statutory 'codes of guidance' to the Act, with each Part of the Act usually having its own code. There is a code of practice to accompany Part 3 of the Act, entitled, 'Code of Practice (assessing the needs of individuals)'.<sup>34</sup> This Code of Practice provides guidance on the five elements of assessment and explains the principles underpinning the assessment of children (see [section 3.9 below](#)). This document is referred to below as the 'Part 3 Code'. In relation to the assessment of [looked after children](#), assessment guidance is also found in the Part 6 Code of Practice (Looked After and Accommodated Children).<sup>35</sup>

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34 Part 3 Code of Practice (assessing the needs of individuals): <https://gov.wales/sites/default/files/publications/2019-05/part-3-code-of-practice-assessing-the-needs-of-individuals.pdf>

35 <https://gov.wales/sites/default/files/publications/2019-05/part-6-code-of-practice-looked-after-and-accommodated-children.pdf>

## 3.9 What issues should be considered as part of an assessment?

In the needs assessment the local authority must do the following:

1. Assess the developmental needs of the child;
2. Seek to identify the outcomes that the child (and the child's parents) wish to achieve;
3. Assess whether, and how much, the provision of the following contribute to the achievement of those outcomes:
  - ◆ Care and support,
  - ◆ Preventative services, or
  - ◆ Information, advice or assistance.
4. Assess whether, and how much, anything else could contribute to the achievement of those outcomes or otherwise meet those needs; and
5. Take account of any other circumstances affecting the child's well-being.<sup>36</sup>

Although the authority must consider these factors, it is up to the authority how it does this, i.e. it is for the authority to decide what is 'proportionate'. In this context, proportionality goes to the question of how wide and deep the assessment ranges, and not whether it is undertaken at all.

Having completed the assessment, if the authority is satisfied that the child has needs for care and/or support, then it must decide if any of these needs meet the eligibility criteria. Where a child's needs meet the eligibility criteria the authority must meet those needs by providing assistance in a variety of ways (see [section 4 on page 22](#)).<sup>37</sup>

Assessments must also consider the following, which may be referred to as the 'five key elements',<sup>38</sup> and there must be an analysis structured around these five elements:<sup>39</sup>

1. The child's circumstances;
2. The child's personal outcomes;
3. Any barriers to achieving those outcomes;
4. The risks to the child or other(s) if those outcomes are not achieved;
5. The child's strengths and capabilities.<sup>40</sup>

The guidance states that all of these five elements must be taken into account during the assessment and a decision reached about whether each of the identified needs is one that must be met by the provision of care and support.<sup>41</sup>

Further detail on these five elements is contained within Annex 1 to the Part 3 Code of Practice (assessing needs of individuals) (see [Resources section on page 39](#)). Some of the examples given in the Annex include the following, although this is not an exhaustive list:

### Element 1: The Child's circumstances

Examples of presenting needs include:

- inability to carry out basic personal care (including maintaining a reasonable standard of health, carrying out basic household activities);
- unlikely to achieve developmental goals (including being unable to maintain/develop family relationships; unable to undertake family and social roles and responsibilities; support systems are at risk, etc.)

36 S21(4)(1)(a)-(e)

37 S32

38 Part 3 Code, para 61 and onwards

39 Part 3 Code, para 55

40 Care and Support (Assessment) (Wales) Regulations 2015 Reg 4

41 Part 3 Code, para 65

## Element 2: The child's personal outcomes

Outcomes are individual to each child but will relate to the national well-being outcomes (defined as outcomes that 'are to be achieved in terms of the well-being of people who need care and support and carers who need support') set out in the well-being statement. The statement includes the following definitions of what well-being means:<sup>42</sup>

- securing rights (e.g. knowing where to get help and support; being listened to);
- physical and mental health, emotional well-being, intellectual, social and behavioural development (e.g. being healthy and active, being happy, getting the right care and support as early as possible);
- protection from abuse and neglect (e.g. being safe and protected and knowing where to make concerns known);
- education, training and recreation (e.g. learning and developing to full potential and doing things that matter to you);
- domestic, family and personal relationships (e.g. belonging, contributing to safe and healthy relationships);
- contributing to society (making a contribution and feeling valued);
- social and economic well-being (choosing who to spend time with, not living in poverty, getting help to grow up and be independent, getting care and support through the Welsh language if wanted);
- suitability of living accommodation (living in appropriate housing).<sup>43</sup>

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<sup>42</sup> Well-being statement for people who need care and support and carers who need support, <https://gov.wales/sites/default/files/publications/2019-05/well-being-statement-for-people-who-need-care-and-support-and-carers-who-need-support.pdf>

<sup>43</sup> Well-being statement for people who need care and support and carers who need support: <https://gov.wales/sites/default/files/publications/2019-05/well-being-statement-for-people-who-need-care-and-support-and-carers-who-need-support.pdf>

## Element 3: Any barriers to achieving those outcomes

This means consideration of things that prevent your **child** from meeting his/her outcomes and can include something related to your child's condition or circumstances, or something outside of your child's control.

## Element 4: The risks to the child or other(s) if those outcomes are not achieved

There will be an evaluation of risk when determining a need for care and support. This should be a balance between ensuring the health and safety of the child is not put at risk against curtailing the child's choice, autonomy and independence.

## Element 5: The child's strengths and capabilities

This means taking into account the skills, capacity, support and materials available to a child from within themselves, their family and their community, which can be used to meet their needs. The assessment should identify these resources, enable the child to make the best use of them and maximise the contribution they make to achieving personal outcomes. However, the assessor must recognise that people's needs fluctuate over time and such changes in level of need must be anticipated in the assessment.<sup>44</sup>

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<sup>44</sup> Part 3 Code, Annex 1: Guidance on the Five Elements of Assessment p 28

### 3.10 Who will be involved in the assessment and how will it be carried out?

The local authority responsible for the assessment must ensure that there is a named individual whose job it is to co-ordinate the carrying out of the assessment.<sup>45</sup> The authority must ensure that any person carrying out the assessment has the skills, knowledge and competence to carry out the assessment and has received the requisite training.<sup>46</sup> Guidance stipulates that an appropriate assessor would include, for example, a registered social work or social care practitioner holding a professional qualification at level 5 or above, or a person holding a social care qualification at level 4 or above.<sup>47</sup>

Moreover, when carrying out an assessment, the authority must consider whether the nature of the child's needs calls for the involvement of a person with specialist skills, knowledge or expertise.<sup>48</sup>

If the involvement of such a person is needed, then the authority must either consult with such a person, or arrange for that person to undertake the assessment themselves.<sup>49</sup>

Therefore, in most cases, a social worker from the local authority will take the lead role in co-ordinating the assessment of your child's needs, although professionals from other agencies may also be involved.

The social worker must of course meet with you and your child as well as other key persons (such as other members of your family) and may need to meet you a number of times.

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45 Care and Support (Assessment) (Wales) Regulations 2015 Reg 2

46 Care and Support (Assessment) (Wales) Regulations 2015 Reg 3

47 Part 3 Code, para 43

48 Care and Support (Assessment) (Wales) Regulations 2015 Reg 3 (2)

49 Care and Support (Assessment) (Wales) Regulations 2015 Reg 3 (3)

### 3.11 Will my views and the views of my child be taken into account?

The Act makes clear that the assessment must, so far as is reasonably practicable, ascertain the child's views, wishes and feelings.<sup>50</sup> Furthermore, the assessment must also promote and respect the child's dignity, consider their characteristics, culture and beliefs, and provide appropriate support to enable the child to participate in decisions being made about him or her.<sup>51</sup> These same principles apply to a carer's assessment, but in addition, the local authority must also start from the position that the **adult** is best placed to judge their own well-being.<sup>52</sup>

Your child's assessment must involve your child and any person with **parental responsibility**,<sup>53</sup> and consider the importance of promoting the upbringing of the child by his or her family (to the extent that this is consistent with the child's well-being).<sup>54</sup> Your views will be of great importance and you should be encouraged to contribute to the process. If you would like a friend, advocate or relative to support you during the assessment, this should be arranged.<sup>55</sup> The assessment must address the central or most important aspects of the needs of the child and the capacity of you as parent(s) to respond appropriately to these needs within the wider family and community context.<sup>56</sup>

Your child must be seen for the purposes of the assessment. This will include observation of the child and communicating with the child in a manner appropriate to his/her age and understanding.

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50 S6(2)(a)

51 S6(2)(b)-(d)

52 S6(3)(a)

53 S6(4)(b); and Part 3 Code, paras 15 and 23

54 S6(4)(a)

55 Part 3 Code, para 13

56 Part 3 Code, para 25

Your child should also be told, in a manner appropriate to his/her age and understanding, why these assessments are being carried out and be encouraged to be involved in the assessment process. Those responsible for planning the assessment should consider whether your child or other family members have any communication needs and if so, how these might be met. The guidance in the Code of Practice emphasises the fact that assessments should be “child-centred”<sup>57</sup> and that the best interests and well-being of the child are met.<sup>58</sup> The guidance states that direct work with children during assessment is important to ascertain their wishes and feelings.<sup>59</sup>

For children under the age of 16 the guidance stipulates that the assessment should ascertain and have regard to the views, wishes and feelings of persons with [parental responsibility](#) for the child in so far as this is reasonably practicable and consistent with promoting the well-being of the child.<sup>60</sup>

### 3.12 How long should an assessment take?

The response from a local authority to an initial contact or referral requesting help is critically important.<sup>61</sup> The guidance notes that a timely response to a child’s needs is vital.<sup>62</sup> The authority must have structures in place to ensure an effective, accessible and speedy response to children and their families.

The timescale for completion of the assessment is a maximum of 42 working days from the point of referral.<sup>63</sup> The guidance notes that completion of a comprehensive assessment within 42 working days of referral should not take precedence over consideration of what is

happening in the child’s life and what immediate action is needed, however difficult or complex the child’s circumstances.<sup>64</sup> The key issue, in this context, is “reasonableness”. Is the time taken reasonable? If the need is urgent, then the assessment process should be done quickly. If the need is complex and non-urgent, then it may of course take longer – especially if it necessitates meetings with many professionals. However, even in such cases, a local authority could implement part of the care plan as a short term measure. **Whatever** the timescale of the assessment, social workers should not wait until it is concluded before commissioning services, and, in some cases, the needs of the child will mean that a quick assessment is necessary.

This means that there is no one-size-fits-all timescale for an assessment; what is reasonable will be determined by the specific needs of your child, which may emerge over time during the assessment process. Nonetheless, the guidance sets out (as noted above) a “maximum timeframe” of 42 days from the point of referral. It is crucial to remember that this is an “outer limit” and not a target; failure to comply with the 42 day timeframe, without very good reason, will be a basis for a complaint and potentially legal action against the local authority concerned. If you believe that there is a delay, due to the local authority not acting with due diligence, you should consider making a complaint about this (see [section 8 on page 35](#)).

The guidance makes clear that the process of assessment cannot continue unchecked over a prolonged period without an analysis of what is happening and what action is needed, however difficult or complex the child’s circumstances.

When the assessment has been completed, you (and, if appropriate, your child) should be informed in writing, and/or in another more appropriate medium, of the decisions made. You should be given the opportunity to record your views, including any disagreements,

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57 Part 3 Code, para 69

58 Part 3 Code, para 76

59 Part 3 Code, para 74

60 Part 3 Code, para 75

61 Part 3 Code, para 78

62 Part 3 Code, para 34

63 Part 3 Code, para 78

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64 Part 3 Code, para 34



and you can ask that corrections are made to the recorded information. You should be offered a copy of the record.<sup>65</sup>

### 3.13 What will happen after the social worker has obtained all the relevant information?

Once the local authority has gathered the relevant information the authority must decide if the child's 'needs' are such that they meet the eligibility criteria, and, if so, what care and support is made available to address those needs.

If you do not agree with any of the findings of the assessment, you should be given an opportunity to record your point of view on the assessment record.

### 3.14 How will the local authority decide if my child's needs meet the eligibility criteria?

Once the relevant information has been gathered the authority decides if the child's needs meet the eligibility criteria.<sup>66</sup> The regulations provide for four stages in this process, which are as follows:

#### Stage 1: Does the need arise for a specific reason?

A child's need meets the eligibility criteria if the need arises **either**:

- from the child's physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances;<sup>67</sup> **or**
- the need is one that if unmet is likely to have an adverse effect on the child's development.<sup>68</sup>

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65 The Care and Support (Assessment) (Wales) Regulations 2015 Reg 6(2)

66 S32(1)

67 The Care and Support (Eligibility) (Wales) Regulations 2015 Reg 4(a)(i)

68 The Care and Support (Eligibility) (Wales) Regulations 2015 Reg 4(a)(ii)

#### Stage 2: Does the need relate to certain key activities?

A child's need will meet the eligibility criteria if it relates to one or more of the following:

- Ability to carry out self-care (see below for definition of 'self-care') or domestic routines;
- Ability to communicate;
- Protection from abuse or neglect;
- Involvement in work, education, learning or in leisure activities;
- Maintenance or development of family or other significant personal relationships;
- Development and maintenance of social relationships and involvements in the community; or
- Achieving developmental goals.<sup>69</sup>

'Self-care' is defined in the regulations as meaning 'tasks that a person carries out as part of daily life including':

- Eating and drinking;
- Maintaining personal hygiene;
- Getting up and getting dressed;
- Moving around the home;
- Preparing meals;
- Keeping the home clean, safe and hygienic.<sup>70</sup>

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69 The Care and Support (Eligibility) (Wales) Regulations 2015 Reg 4(b)

70 The Care and Support (Eligibility) (Wales) Regulations 2015 Reg 1(3)

### Stage 3: Are the child's parents unable (or unwilling) to meet that need?

The need is one that neither the child, nor his/her parents, is able to meet either:

- Alone or together;
- With the support of others willing to provide the care and support; or
- With the assistance of services in the community to which the child or his/her parents have access.<sup>71</sup>

This element effectively makes a child ineligible if their carer indicates they are willing to provide support. It is therefore essential, to stop this situation from arising, for parent carers to state clearly that they are not able (and therefore not willing under stage 3) to provide care unless the local authority has first determined that the child in need is eligible. Then, and only then, will they be able (and therefore willing) to discuss with the child in need and the authority the nature and extent of the care (if any) they might be willing to provide. If a parent clearly explains this during the assessment process then the local authority must find the child eligible (so long as the other three stages are also met). If this is not stated, then there is a risk that the child will be found ineligible for any care and support.

### Stage 4: Can the need only be met by the local authority providing/arranging support services or Direct Payments?

To be eligible, a child must be unlikely to achieve one or more of the child's personal outcomes unless the local authority provides or arranges care and support to meet the need (including by Direct Payment).<sup>72</sup>

71 The Care and Support (Eligibility) (Wales) Regulations 2015 Reg 4(c)

72 The Care and Support (Eligibility) (Wales) Regulations 2015 Reg 4(d)

An example would include a family which is at risk of breakdown due to the mother struggling to cope with the challenging behaviour of one of the children. If, despite receiving advice on managing behaviour and improving living conditions in the home, there is no improvement in the family circumstances, then the family is not meeting its own needs and outcomes. This means that the family will meet the eligibility criteria because it cannot meet its own needs and outcomes without the authority providing care and support.<sup>73</sup>

### The 'can' and 'can only' test

The Welsh Government initially described the above criteria as creating a 'can and can only' test. This attracted considerable criticism, including the suggestion that it placed the onus on individuals to prove that they had tried generalised community support services (and that these had failed) before they could then access personalised support (such as a Direct Payment). This analysis was strongly rejected by the Government Minister who affirmed that users do not have to 'demonstrate exhaustively that they have explored every other possible avenue of support before becoming eligible for local authority assistance'. The Minister confirmed that the responsibility lies firmly with the assessor, and not the person being assessed.

This stance is restated in the guidance as follows, 'the eligibility criteria must not be used as a tool to require individuals to demonstrate they have exhausted every other possible avenue of support before becoming eligible for local authority assistance'.<sup>74</sup> And further, 'it is the responsibility of the local authority to identify and record (...) how the personal outcomes will be achieved'.<sup>75</sup>

Given the complexity of this area, it is likely to be sensible for parents to seek legal advice where it is unclear whether the local authority have applied the [eligibility criteria](#) appropriately.

73 Part 4 Code of Practice (meeting needs), Annex 1

74 Part 4 Code, para 32

75 Part 4 Code, para 33

However, the eligibility criteria cannot be used to refuse an initial assessment of need.

The following examples may be useful in illustrating when an authority's application of the **eligibility criteria** will be, and will not be, lawful:

- **Your local authority refuses to carry out an assessment of your child's social care needs because it claims that only children with "severe disabilities" are eligible for an assessment.**

This will be unlawful. The duty to assess is mandatory if the child 'may' have a need for care and/or support.<sup>76</sup>

- **Your local authority carries out an assessment of your child's social care needs, and informs you that it is satisfied that your child satisfies the eligibility criteria and that it is necessary to provide practical assistance for your child in the home. However, it says that the assistance will not be provided because it has resource constraints and because your child's needs are insufficiently severe to require the assistance that is necessary.**

This is likely to be unlawful. Once a local authority has satisfied itself that particular services are necessary, it is under a duty to provide them, and cannot rely on resource considerations or eligibility criteria to deny access.

- **Your local authority carries out an assessment of your child's social care needs and informs you that although your child has needs for care and support, because these are currently being met by you as a parent carer, your child is ineligible and they are closing the file.**

This is likely to be lawful. If you subsequently become unable to provide the care to your child the local authority will have to reassess. To avoid this situation arising, in cases where you are in need of help (and at risk of being unable to cope) you may need to make

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76 S21(1)

clear, during the assessment process, that without help you are not willing or able to provide the necessary care and support to your child, and that this will be the case until (at least) the local authority has determined that your child is eligible and explained to you what support it will provide.

## 3.15 Will my own needs be assessed as well?

### Your child's assessment

During your child's assessment, the assessor should ascertain your views, wishes and feelings, so far as reasonably practicable.<sup>77</sup> One of the important principles listed in the guidance underpinning the approach to assessment of children and their families is that assessments must involve working with children and their families.<sup>78</sup>

### Your own assessment

In addition, where it appears to a local authority that a **carer** may have needs for support then the authority must carry out an assessment<sup>79</sup> of the carer. A carer is defined in the Act as a person who provides or intends to provide care for an adult or a disabled child.<sup>80</sup>

The Act removes: (1) the requirement for a carer to establish that they are providing or intending to provide 'a substantial amount of care on a regular basis'; and (2) the requirement that carers 'request' an assessment, because the assessment obligation will be triggered by the 'appearance of need'.

The duty to assess applies regardless of the authority's view of the level of the carer's need for support,<sup>81</sup> or their financial situation.<sup>82</sup>

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77 Part 3 Code, para 75

78 Part 3 Code, para 77

79 S24(1)(a)

80 S3(4); and Part 3 Code, p.7, 2nd bullet point

81 S24(3)(a)

82 S24(3)(b)

The Act also requires that specific consideration be given to:

- The extent to which the **carer** is able, and will continue to be able, to provide care for the child;
- The extent to which the carer is willing, and will continue to be willing, to do so;
- The outcomes an adult carer wishes to achieve;
- What support, preventative services or information, advice or assistance, could contribute to the achievement of those outcomes;
- Any other matters which could contribute to the achievement of those outcomes.
- Whether the carer works or wishes to do so;
- Whether the carer is participating in or wishes to participate in education, training or any leisure activity.<sup>83</sup>

In addition, for carers who are children themselves, the Act requires that specific consideration be given to:

- The outcomes a child carer wishes to achieve<sup>84</sup> (though this is qualified by it being 'to the extent' that it is 'appropriate having regard to the carer's age and understanding'), and the views of the parents of the young carer on this question;<sup>85</sup>
- The developmental needs of the child, and whether it is appropriate for the child to be providing the care at all.<sup>86</sup>

When assessing children who are carers the authority should consider whether a child carer is actually a child with care and support needs in his or her own right and who therefore should in fact be assessed under section 21 of the Act.<sup>87</sup>

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83 S24(4)(a)-(c), (e)-(f) and S24(5)(a)-(b)

84 S24(4)(d)

85 S24(4)(d)

86 S24(5)(c)

87 Part 3 Code, p.7, 5th bullet point

As with the assessment duty owed to disabled children, the way a carer's assessment is undertaken should be 'proportionate in the circumstances'.<sup>88</sup> Proportionality goes to the scope and depth of an assessment, and not to the question of whether one is undertaken: the duty to assess (where a need may exist) is obligatory.

When carrying out assessments the authority must have regard both to your own well-being and the well-being of your child (for the definition of well-being see **section 2 on page 8**).

In carrying out a carer's assessment, the local authority must involve you, any child for whom you have parental responsibility, and any other person you ask them to involve (e.g. other family members). Having carried out the assessment, the local authority must provide you, and any other person you specify, with a written record of the outcome.<sup>89</sup>

The local authority must take the results of your carer's assessment into account when deciding what services, if any, to provide to your child and your family. It must also consider whether you have any needs independent of your child's needs (for example because you have a disability or illness). If so, you may be entitled in your own right to a "needs assessment" under section 19 of the Act.

Having completed the assessment, if the authority is satisfied that you have needs for 'support' then it must decide if any of those needs meet the eligibility criteria (on eligibility criteria, see **section 3.9, page 13**).<sup>90</sup> If the carer's needs meet the eligibility criteria then the authority must meet those needs by providing assistance in a variety of ways. The support may be provided to the carer, although more commonly it will be provided to the disabled child as a form of replacement care. The range of support that can be provided is considered in **section 4 on page 22**.

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88 S24(7)

89 S24(6); and The Care and Support (Assessment) (Wales) Regulations 2015, Reg 6(1)

90 S32(1)(a)

## 3.16 Can I refuse an assessment?

As an adult carer, you can refuse to undergo an assessment.<sup>91</sup> Such a refusal does not prevent you from requesting an assessment at any point in future.<sup>92</sup>

## 3.17 Will my assessment be combined with my child's assessment?

A local authority may combine a carer's assessment with the assessment of the disabled child, but only where both consent to this.<sup>93</sup> The only exception to this is for children under the age of 16 where an assessment can be combined if the authority is satisfied that 'combining the needs assessment would be consistent with the child's well-being'.<sup>94</sup> The guidance states that this would only be where the authority considers that it would be 'beneficial' to do so.<sup>95</sup>

Local authorities must display flexibility on this question and pay particular attention to the needs of parent carers for whom a separate assessment may well be beneficial in most cases. It would be unlawful for an authority to adopt a rigid rule of always combining assessments.

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91 S25(1)

92 S25(3)

93 S28

94 S28(6)

95 Part 3 Code, para 37

# 4. What can Local Authorities do for us?

## 4.1 What help and support might a child/family receive following an assessment?

There is a range of different social care services which local authorities may provide to disabled children. These include:

- accommodation in a care home, children's home or premises of some other type;
- care and support at home or in the community;
- services, goods and facilities;
- information and advice;
- counselling and advocacy;
- social work;
- payments (including Direct Payments);
- aids and adaptations;
- occupational therapy.<sup>96</sup>

This is simply an illustrative list of 'ways in which a local authority may meet needs', and particular services found in old legislation<sup>97</sup> are likely to fall under these headings.

If the local authority decides that your child and your family require help and support, then it must decide what type of help and support should be given.<sup>98</sup> The type of help and support offered to you and your family will depend on your assessed needs.

Care and support at home or in a community setting might include the following:

- Practical assistance in the family home such as home help, personal care, equipment and a sitting service;

- Community-based services such as a day centre, after-school club, holiday play scheme, etc.
- Travel and other assistance to help your child participate in activities such as recreation or education;
- Adaptations to the home.

Where the need has been assessed as eligible, the Act<sup>99</sup> and the relevant regulations<sup>100</sup> and guidance<sup>101</sup> enable the parent to require the local authority to make them a Direct Payment rather than arrange the necessary care.

If you or your family are finding it difficult to cope, then the local authority will need to consider what support is required. This may mean that you are provided with services known as 'respite care' or 'short term breaks'. While these may be described as services to you and your family, they are in fact services for your disabled child because these services are helping you and your family support your child. They also help to address your child's need to have a family that is not pulled apart due to the pressures of caring for a disabled child.

Short term breaks include the provision of a 'sitting service' (i.e. someone to look after your child in your home), an overnight 'in home' service or your child spending time in a community-based day care facility. Such breaks could also include your child spending a short time in residential accommodation. The provision of accommodation for your child both on a temporary basis (as 'respite care' or 'short breaks'), or on a longer term basis is discussed in [section 4.4 on page 24](#).

96 S34(2)

97 S2 Chronically Sick and Disabled Persons Act 1970; and Ss21/29 National Assistance Act 1948

98 S32(2)(a)

99 S32(1)(a)

100 The Care and Support (Direct Payments) (Wales) Regulations 2015

101 Part 3 Code

The help and support that is to be given to your child and your family must be set out in a care plan (which might also be referred to as 'support plan'<sup>102</sup>). The contents of the care plan should be discussed and agreed with you,<sup>103</sup> and you and your child must be involved in the preparation (and, if necessary, review and revision) of the care plan.<sup>104</sup> If you are informed that no services or support will be provided to you and/or your child you may wish to make a complaint about this.

## 4.2 When does a local authority have to provide this help and support?

The Act strengthens the rights of some disabled children to support as it places a duty on local authorities to provide all children with the care and support they are assessed as needing, or in order to protect them from harm.<sup>105</sup>

However, the Act states that the duty to meet the needs of an otherwise eligible child 'does not apply to a child's needs to the extent that the local authority is satisfied that those needs are being met by the child's family or a carer.'<sup>106</sup> The potentially negative impact of this provision can be neutralised if, you, as carer, are explicit in stating:

- You are unwilling to provide care unless (and until) your child is assessed as eligible; and
- The nature and extent of the care (if any) you might be willing to provide will have to be the subject of specific discussions and specific agreement.

The duty on an authority to meet needs does not apply to children who are 'looked after',<sup>107</sup> which means that they are accommodated or the subject of a care order. These children are covered

by a tranche of provisions under Part 6 of the Act (which largely replicate sections in Part III Children Act 1989, discussed below).

The guidance gives considerable emphasis to the provision of timely support for families (and in doing so, minimising the risk that families will unexpectedly reach 'breaking point'), stressing for example that it is 'important to identify early on what needs the family has and provide appropriate support and/or make appropriate referrals'.

The duty to meet the needs of the child and/or his/her carers is strict in the sense that it is 'non-resource' dependent. Accordingly, if the assessment identifies a need for (say) 10 hours of sitting services a week, or one weekend a month for the child to be accommodated away from the home, then this need must be met precisely and it is not something that the local authority can 'trim' because it has to make cut backs due to resource shortages. Therefore, if your child is assessed as requiring short breaks then these must be provided.

## 4.3 Will we be charged for the services that are provided?

Local authorities cannot charge for services they provide or arrange to be provided to children.<sup>108</sup>

For carers, local authorities are permitted to charge for services they provide. However, the guidance makes clear that authorities should consider carefully the impact of imposing charges on carers, particularly regarding their willingness and ability to continue caring.<sup>109</sup> In any event, it is not permissible to charge more than is 'reasonably practicable for the person to pay'.<sup>110</sup>

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102 S54(1) and (2)

103 Part 4 Code, para 66

104 S54(7)

105 S37

106 S37(5)

107 S37(6)

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108 The Care and Support (Charging) (Wales) Regulations 2015, Reg 3(a)

109 Part 4 and 5 Code of Practice (charging and financial assessment)

110 S66(1)

The maximum charge is currently £ 100 per week.<sup>111</sup>

Local authorities are not permitted to charge for the actual assessment process itself, even if the individual is to fund their own care.<sup>112</sup>

## 4.4 What should I do if my family needs a break from caring?

You should ask for an assessment of your child's needs, as well as a carer's assessment (see [section 3 on page 10](#)).

There is no legislation specifically labelled 'short breaks' or targeted on the rights of families with disabled children to 'short breaks'. However, it is clear that the core provisions of the Act are designed to provide a range of support services for families with disabled children and (although not specifically named) 'short breaks' are one of these essential support services.

The need for short breaks support may arise either from a disabled child's assessment or that of his/her carers: a local authority may meet a person's needs by arranging for 'something to be provided to a person other than the person with (the assessed needs)'.<sup>113</sup> The Act provides examples of what can be provided in such cases and these include the three most common mechanisms for facilitating short breaks, namely:

- accommodation in a care home, children's home or premises of some other type;
- care and support at home or in the community e.g. sitting service (including night sitting service), day centre, after school or summer holiday club;
- Direct Payments.<sup>114</sup>

The need for families to have breaks from caring is now well recognised. As discussed above, it may be possible for short term breaks to be arranged by providing additional services in the family home, such as a sitting services for your child while you and other members of your family go out. However, in some cases it may be necessary for your child to spend a short time away from the family home. This is when short term residential accommodation should be considered.

### Short breaks and 'looked after children'

(for an explanation of a 'looked after child' see [section 4.7 on page 25](#))

Short breaks for 'looked after children' can be provided by the child spending time in an overnight placement: for example, a foster home or respite care centre. These arrangements are covered by separate regulations and guidance<sup>115</sup> on the legal obligations relating to such children. While the guidance emphasises<sup>116</sup> that 'short breaks will often be provided as part of a disabled child's care and support plan',<sup>117</sup> it states that 'sometimes it will be appropriate to place a child with a foster carer or in a residential setting for a short period of time only – for example, if the child is disabled and it is necessary to place the child away from home temporarily while the parents have a break from caring'.<sup>118</sup>

Unfortunately, the guidance in this area is far from helpful as to the legal position in such cases: the break may be provided either under the general duty to meet the needs of children (section 37) or under the looked after children provisions (section 76). If the latter, there are particular regulations which the local authority must ensure the placement complies with. The detail of this is outside the scope of this guide, however, should you find yourself in this position

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111 The Care and Support (Charging) (Wales) and Land Registration Rules (Miscellaneous Amendments) Regulations 2020, Reg 2(a)

112 S59(2)

113 S34(1)

114 S34(2)

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115 Part 6 Code, paras 290-300

116 Part 6 Code, para 291

117 I.e. under Parts 3 and 4 of the Act

118 Part 6 Code, para 290



refer to section 76 of the Act and the guidance under the Part 6 Code for further information. If necessary, you may need to take specific legal advice.

## 4.5 What if my child's support needs mean that I cannot provide care at home?

If you and your family are finding it difficult to cope with caring for your disabled child then you should ask for an assessment of your child's needs, as well as a carer's assessment (see [section 3 on page 10](#)). It may be that by revising your child's care plan so that you are provided with more support, including, but not necessarily limited to, short-term breaks, you and your family find that you can provide your child with the help and support that s/he needs.

The guidance clearly states that the starting point for any assessment must reflect the duty on local authorities to have regard to the importance of promoting the upbringing of the child by the child's family, in so far as doing so is consistent with promoting the well-being of the child.<sup>119</sup> Therefore the local authority should try to do everything possible to enable your disabled child to remain with your family and in order to do so is likely to invite other agencies, such as NHS bodies, to assist in the assessment of your child's needs.<sup>120</sup>

You,<sup>121</sup> together with your child<sup>122</sup> and other members of your family, should be involved in deciding what help and support can be provided so that your child can continue to live at home. However, it may be that your child's disability and/or health care needs are of such a high level and/or severity that it is no longer feasible for your child to be cared for in the family home.

If the local authority concludes that you and your family are not able to provide your child with care or accommodation it must provide your child with accommodation.<sup>123</sup> It does not matter whether the situation is likely to be temporary or permanent, nor does it matter why this situation has arisen. If your child is of school age, it may be that a residential placement is appropriate.<sup>124</sup>

## 4.6 Will my child and I be consulted about a placement away from home?

The local authority will not be able to place your child away from home if you or anyone else with [parental responsibility](#) objects to this. (If they wanted to take such action without your agreement they would need to start care proceedings). In addition, before providing the placement, the local authority will need to take steps to ascertain the wishes and feelings of your child and take these into account.

## 4.7 I have been told that my child is a 'looked after child' – what does this mean?

The definition of a ['looked after child'](#) includes children who are either in the local authority's care (i.e. subject to a care order or an interim care order), or who are provided with accommodation by the local authority for a continuous period of more than 24 hours in the exercise of any of its social service functions (with the agreement of those who have parental responsibility for the child).<sup>125</sup>

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119 Part 3 Code, para 68

120 Part 3 Code, para 70

121 Part 3 Code, para 75

122 Part 3 Code, para 74

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123 Ss74 onwards

124 Part 6 Code of Practice (looked after and accommodated children), para 112 and onwards

125 S74; and Part 6 Code, para 112

## 4.8 What happens when my child becomes an adult?

When your child turns 18 (term referred to as transition) this will trigger the need for a re-assessment.<sup>126</sup>

### Transition for 'looked after children'

Local Authorities are required to provide a range of support to young people that are, or have been, 'looked after children' as they make their transition to the responsibilities of adulthood.

In relation to 'looked after children', the local authority must 'prepare a pathway plan to assist that young person with the transition to adulthood and leaving care. The pathway plan will build upon the child's existing Part 6 care and support plan, which will be subsumed within the pathway plan.'<sup>127</sup>

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126 Part 3 Code, para 95

127 Part 6 Code, para 53

## 5. Direct Payments

### 5.1 Can we arrange the services ourselves?

If you would like to do so, you can ask that, rather than arranging services for your child, the local authority makes a regular payment to you, so that you can purchase the services for your child. These payments are known as 'Direct Payments'. They can cover the cost of a wide range of services, with the guidance stating they can be provided for 'any identified need for care and support'.<sup>128</sup>

Direct Payments can be paid to you on behalf of your disabled child until your child reaches the age of 18 (after 18, if the young person lacks the necessary mental capacity and you are accepted as the appropriate 'responsible person' to receive the payment you can continue

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128 Part 4 Code, para 133

### Transition for children who are not 'looked after'

The Act does not include provisions dealing with local authority responsibilities to disabled children and carers when a young person is in transition into adulthood (apart from for 'Looked After Children'). The Act does not currently provide for a duty to consider the transition needs of children with Special Educational Needs Statements under the Education Act 1996. This means that the duties under the Disabled Persons (Services, Consultation and Representation) Act 1986 sections 5 and 6 remain – namely the duty when the child is 14, that the relevant social services officer be contacted with a view to a social care assessment of the young person's needs being undertaken – so that services are in place when educational provision ceases.

to do so).<sup>129</sup> However, young people have the right to manage their own Direct Payments so long as they have sufficient mental capacity to do so, even if they need some help (and the presumption is that those aged 16 or 17 have the necessary mental capacity).<sup>130</sup>

If you use Direct Payments to employ someone (such as a carer or personal assistant), the local authority must ensure that you are fully aware of your legal responsibilities as an employer and that you receive the necessary support and resources to manage your employment responsibilities.<sup>131</sup> The amount of the payment should be sufficient to cover inherent costs associated with being a legal employer.<sup>132</sup>

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129 S3(3)/S51(1)

130 S51(4)

131 Part 4 Code, para 138

132 Part 4 Code, para 140

The detail of the scheme is set out in regulations, namely the Care and Support (Direct Payments) (Wales) Regulations 2015. Guidance on the scheme is provided in the Part 4 Code of Practice (Meeting Needs), although this is less detailed than the guidance under the previous legislative regime.

You will be entitled to a Direct Payment for your child, on request, if the local authority is satisfied that:

- The payments are to be made to the child or to a person with parental responsibility for a child who has needs for care and support;
- The child or child's parent has capacity (or, under 16, sufficient understanding) to consent to the making of the payments;
- Making the payments is an appropriate way to meet the child's needs, the well-being of the child will be safeguarded and promoted by the making of the payments, and the person receiving the payment is capable of managing the payments, with support if needed;
- The person receiving the payment has consented to it.<sup>133</sup>

## 5.2 What changes are there to the availability of Direct Payments and are there any restrictions on their use?

Direct payments have been made available under the Act in three new situations. First, Direct Payments can now be used to purchase care and support from the local authority itself,<sup>134</sup> which was not possible under previous legislation. Second, they can also now be used to pay a relative who lives in the same household as you.<sup>135</sup> Third, Direct Payments can now be used

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133 S51(3)-(6)

134 S53(9)

135 Part 4 Code, para 165

to fund long term residential care,<sup>136</sup> however one problem at present is that there is little explanation as to how the Direct Payments scheme will cover residential care costs in practice.

In terms of restrictions to the scheme, Direct Payments cannot be used for people eligible for NHS Continuing Healthcare funding (see more below).<sup>137</sup>

Aside from this restriction, the general position is that you have the right to insist on a Direct Payment in order to purchase the services which have been assessed as necessary to meet your child's needs (or your own). If your child is already receiving services directly from your local authority, then you can ask for these to be replaced by Direct Payments. You can also request a "mixed" package whereby some services are provided directly, and you are provided with Direct Payments to purchase others.

## 5.3 What if my child is eligible for NHS Continuing Healthcare?

At present, if your Local Health Board attempts to argue that you or your child is not eligible for NHS Continuing Healthcare, or that the local authority should be meeting these costs, you should seek specific legal advice.

The [Resources section on page 39](#) provides sources of further information on the revised guidance issued by Welsh Government in 2014.

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136 Part 4 Code, para 133

137 S47(1)

## 6. Care and support plans

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Once a local authority has determined that a disabled child (or his/her carers) have eligible needs, then the authority must prepare a 'care and support plan'<sup>138</sup> that explains the 'operational detail': the 'how, who, what and when'. The plan must describe how the need is to be met, by whom, in what way and when this will be done. An assessment must result in a care plan that identifies the child's needs, what is to be done about these needs, by whom and when. If a Direct Payment is made, it must specify precisely what need these payments are intended to meet, why this level of payment is considered appropriate, or what outcome this will result in. A copy of the assessment record must be offered to the disabled child and their parent(s).<sup>139</sup>

### 6.1 What should be in my child's care and support plan?

Your local authority must produce a 'care and support plan' for your **child** if your child's needs have been assessed as eligible.<sup>140</sup> In addition, they must also produce a 'support plan' for you if you have been assessed as eligible as a carer.<sup>141</sup> The plan(s) will be based on the findings of the assessment of your child's needs and how you and your family might be helped to respond to those needs through the provision of social care services and support. You should be given a copy of the plan.

You, your child, and, if feasible, the child's carer (if different from you), must be involved in the preparation of the plan. In the case of a plan for a carer, the authority must involve the **carer** themselves and, where possible, the person for whom the carer provides care.<sup>142</sup>

The guidance makes clear that the plan must be developed in partnership with you and your child to ensure there is an agreed understanding of how the needs will be met and personal outcomes achieved.<sup>143</sup>

The plan must cover the following:

- The personal outcomes which have been identified in relation to the person to whom the plan relates (see [Section 3.9 on page 13](#) for more detail);
- The actions to be taken by the local authority and other persons to help the person achieve those outcomes;
- The needs that will be met through the delivery of care and support;
- How progress towards achieving those outcomes will be monitored and measured;
- The date of the next review of the care plan.<sup>144</sup>

Where appropriate, the plan should also set out:

- The roles and responsibilities of the individual, carers and family members and practitioners;
- The resources (including financial resources) required from each party.<sup>145</sup>

Where some or all of the needs are to be met by Direct Payments, the plan must also contain a description of:

- The needs which are to be met by Direct Payments; and
- The amount and frequency of the Direct Payments.<sup>146</sup>

Plans must contain a clear date, which should be agreed with you and your child, by which the plan will be reviewed. See [Section 6.2](#) for more information on review dates.

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138 S54

139 The Care and Support (Assessment) (Wales) Regulations 2015 Reg 6; and Part 3 Code, para 116

140 S54(1)

141 S54(2)

142 S54(7)

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143 Part 4 Code, para 66

144 Part 4 Code, para 84

145 Part 4 Code, para 85

146 Part 4 Code, para 86

The guidance requires practitioners to ensure there is clear and concise confirmation of the agreed actions, and who will undertake them.<sup>147</sup> Therefore if you consider that the care plan produced by your local authority is vague, unclear or otherwise unhelpful, you should not hesitate to raise this with your local authority, including by way of a complaint if necessary. Ultimately, a failure to produce a clear and comprehensive care plan could be challenged in court; indeed, there have been a number of legal cases under previous legislation in which care plans have been overturned for failing to provide a sufficiently clear identification of needs, what is to be done about them, by when and by whom.

## 6.2 How often will the care and support plan be reviewed?

The local authority must keep care and support plans under review to understand whether what is being provided is meeting the needs of the individual.<sup>148</sup> If the plan is not meeting the eligible needs of the individual, for example, if the authority believes that an individual's circumstances have changed in a way that affects the plan, then the authority must review the plan.<sup>149</sup>

You or your child can request a review of the care plan<sup>150</sup> and the authority must comply with this request if the plan is not meeting your child's needs.<sup>151</sup> However, if the authority thinks the plan is satisfactory then it can refuse to review the plan.<sup>152</sup>

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147 Part 4 Code, para 83

148 Part 4 Code, para 113

149 S54(4); and The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 4(1); and Part 4 Code, para 58

150 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 5(1)

151 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 5(2)

152 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 5(3)

You or your child must be involved in the review.<sup>153</sup> The local authority should also involve:

- anyone you ask them to involve;
- any practitioner/professional(s) who will need to undertake a related assessment;
- any practitioner/professional with expertise in your or your child's circumstances;
- any other person with sufficient involvement in the care of your child;
- an advocate.<sup>154</sup>

All care and support plans must have a review date, which must be agreed or set out at the very start, and at each subsequent review. The review must take place within the period agreed. For a child, the review date must not exceed 6 months, and for an adult the review date must not exceed 12 months.<sup>155</sup> However, if it appears that needs are not being met then the authority must undertake a review, whether or not the review date has been reached.<sup>156</sup>

The purpose of a review is to:

- Monitor progress and changes;
- Consider the extent to which the delivery of the plan is meeting assessed needs and how it has helped the individual or family achieve their outcomes;
- Determine what support is needed in future, and confirm, amend or end the services involved.

The above must be reflected in the recording of the review.<sup>157</sup>

Where a plan includes provision for Direct Payments then any review of the Direct Payments must also involve a review of the care and support plan too.

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153 Part 4 Code, para 117

154 Part 4 Code, para 118

155 Part 4 Code, para 121

156 Part 4 Code, para 122

157 Part 4 Code, para 114

Similarly, where a review results in a change to the care and support plan there must also then be a review of the Direct Payments.<sup>158</sup>

Following any review, the authority must decide whether to 'confirm, revise or close' the care plan. In doing so, the authority must consider whether there are any changes to the following:

- Personal outcomes or personal circumstances;
- Eligible needs;
- Whether the current actions of the authority to support the individual are working;
- Whether there are other ways the authority or others can help the person achieve the personal outcomes or otherwise meet their eligible needs.<sup>159</sup>

Whatever action the authority take, they need to tell you. If they are confirming your current plan, they must record their decision and the reasons for it.<sup>160</sup> If they are revising the plan, they must prepare a revised plan.<sup>161</sup> If they decide to close your plan, they must prepare a 'closure statement'<sup>162</sup> which must be recorded.<sup>163</sup> A 'closure statement' must contain reasons, an evaluation of the extent to which the personal outcomes were achieved, and, where the individual still has needs, confirmation that these needs can be met by services available in the community.<sup>164</sup> A plan must not be closed without a review.<sup>165</sup>

The authority must provide and keep under review support plans for carers whose needs meet the eligibility criteria in the same way as they do for individuals with needs for care and support. This is to ensure carers are treated in the same way.<sup>166</sup> This is the case even if there is no duty to support the needs of the person cared for and there is no separate care and support plan for that person.<sup>167</sup>

If you have minor concerns with the package of care your child is receiving then the usual review meeting is a useful opportunity to raise these; however, for more serious concerns, you should not feel the need to wait until an arranged meeting and should raise them with your local authority directly (via their complaints procedure if necessary).

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158 Part 4 Code, para 123

159 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 6(1) and (2)

160 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 6(3)

161 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 6(4)

162 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 6(5); and Part 4 Code, paras 125 and 127

163 Part 4 Code, para 127

164 The Care and Support (Care Planning) (Wales) Regulations 2015, Reg 6(6)

165 Part 4 Code, para 58/124

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166 Part 4 Code, para 62

167 Part 4 Code, para 62

# 7. The Equality Act 2010 and social care services

The [Equality Act 2010](#) brings together wide ranging provisions to protect certain groups of people, including disabled people, from discrimination. It also requires public bodies such as local authorities to take action to eliminate discrimination from within their organisations (an obligation known as the 'public sector equality duty'). This section summarises how the Equality Act 2010 will be relevant to you and your disabled child when receiving (or seeking to receive) social care services from local authorities.

## 7.1 What protection does the Equality Act 2010 offer my child?

The Equality Act 2010 offers protection from discrimination and [harassment](#) to people based on a 'protected characteristic'. [Victimisation](#) is also unlawful. The following protected characteristics apply (with varying degrees of protection) in relation to services provided by local authorities or when they are exercising their public functions (such as making decisions about priorities for services):

- Age (for people aged 18 or over in a services and exercise of public functions context)
- Disability
- Gender reassignment
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation.

Under the Equality Act, your child has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.<sup>168</sup>

As a disabled child, your child will receive protection when seeking to use services, using services, and, in certain circumstances, once they are no longer receiving the service.

The Equality and Human Rights Commission (EHRC) has issued a range of guidance on the Equality Act including the 'Services, public functions and associations: Statutory Code of Practice' ('the Services Code')—see [Resources section on page 39](#).

## 7.2 What protection does the Equality Act 2010 offer for my child when receiving social care services?

The Act makes it unlawful for service providers to discriminate against your child:

- in relation to a particular service;
  - ◆ by refusing to provide your child with the service and/or
  - ◆ by not providing your child with the same level of service or in the same manner or on the same terms as they would usually give to members of the public or to a section of the public to which they belong, such as hospital outpatients.
- by terminating the provision of the service;
- by subjecting your child to any other detriment.
  - ◆ 'Detriment' is not defined in the Act and has a broad meaning. The Services Code (paragraph 9.7) explains that while it does not need to have any physical or economic consequences, it should amount to something a service user 'might reasonably consider changed their position for the worse or put them at a disadvantage'.

In addition, a service provider must not engage in discrimination, harassment or victimisation when exercising a public function. The interpretation of this is broad. The Services Code (paragraph 11.26) explains that 'refusing to allow someone to benefit from the exercise of a function, or treating someone in a worse manner in the exercise of a function' are examples of the types of discrimination that would be covered by this provision.

## 7.3 What are the different forms of discrimination?

- **Direct discrimination** – treating one person less favourably than another because of a protected characteristic.

**Example:** an Accident and Emergency service refusing to treat a child who has fallen out of a tree because the child has Down's Syndrome and the service does not believe it has the necessary expertise to treat the child as a result.

Generally direct discrimination cannot be justified; however, in relation to age, direct discrimination can be justified if it is a proportionate means of achieving a legitimate aim. It is always lawful to treat a disabled person more favourably than a non-disabled person because of their disability.

Direct discrimination by association and direct discrimination by perception are also unlawful. 'Direct discrimination by association' means discriminating against a person on the basis of their association with another person who has a protected characteristic (e.g. turning someone down for employment on the basis that they have caring responsibilities for a disabled child and so will be unable to focus on the job). 'Direct discrimination by perception' means discriminating against someone based on a perception or belief that they

have a protected characteristic, whether or not that is actually the case (e.g. turning someone down for a job in the belief that the individual in question is over 40 years old and therefore too old, when in fact that person is significantly younger).

- **Indirect discrimination** – applying a provision, practice or criteria in the same way for all people, which has the effect of putting people who share a protected characteristic at a particular disadvantage compared with people who do not have that protected characteristic, unless it can be shown that it is a 'proportionate means of achieving a legitimate aim'.

**Example:** (adapted from the Services Code): a GP's surgery sets up a website to enable the public to access its services more easily. However, the website has all of its text embedded within graphics. Although it did not intend to discriminate indirectly against service users with a visual impairment, this practice places those with a visual impairment at a particular disadvantage because they cannot change the font size or apply text-to-speech recognition software and cannot access the website as a result. As well as giving rise to an obligation to make a reasonable adjustment to their website, this practice will amount to unlawful indirect discrimination on the basis of disability unless the surgery can justify it.

- A failure to make reasonable adjustments (for disabled people only) – see below.
- Pregnancy and maternity discrimination – treating a girl/woman unfavourably because she is or has been pregnant, has given birth within the last 26 weeks or is breastfeeding a baby who is 26 weeks old or under.
- Discrimination arising from disability (for disabled people only) – treating a disabled



person unfavourably because of something arising in consequence of their disability, unless it can be shown that the treatment is a proportionate means of achieving a legitimate aim. If the service provider has failed to make an appropriate reasonable adjustment, it will be very difficult for them to prove the treatment was justified. If the service provider did not know and could not reasonably have been expected to know that the person was disabled, the unfavourable treatment will not amount to discrimination arising from disability.

**Example:** a child with ADHD is turned down for a respite break as his social services department considers his behaviour (which is an involuntary consequence of his disability) will be too disruptive for other children. It would be for the social services department to justify this treatment. If it fails to make a reasonable adjustment which could have prevented or minimised the unfavourable treatment, it will be hard for it to do so.

## 7.4 How does the reasonable adjustments duty apply to services provided by local authorities?

The reasonable adjustment duty is an anticipatory and continuing duty owed to disabled service users generally. This means that local authorities need to think about and plan for the needs of their disabled service users in general and not wait until an individual disabled service user approaches them.

Both service providers and those exercising a public function are required to take reasonable steps to:

- avoid substantial disadvantage where a

practice, provision or criterion puts disabled service users at a substantial disadvantage;

- avoid substantial disadvantage where a physical feature puts disabled service users at a substantial disadvantage; this covers removing the feature in question, altering it or providing a reasonable means of avoiding it, or where the disadvantage cannot be avoided, by providing a reasonable alternative means of providing the service or exercising the function;
- provide an auxiliary aid or service where a failure to do so would put a disabled service user at a substantial disadvantage.

(Note: 'Substantial' means more than minor or trivial in relation to the provision of services; there is a particular meaning given to substantial disadvantage when someone is subjected to a detriment in the exercise of a public function.)

**Example:** A physiotherapy service extends the usual time of their appointments to accommodate the extra time required by a girl with cerebral palsy who communicates by way of a communication aid assisted by her personal assistant. This is likely to be a reasonable adjustment to make.

If the provision, practice or criterion or the auxiliary aid or service involves the provision of information, the steps it is reasonable to take include taking steps to ensure the information is provided in an accessible format.

## 7.5 Can local authorities charge us for the cost of making a reasonable adjustment?

No – your child cannot be charged for the cost of making a reasonable adjustment.

## 7.6 What is the public sector equality duty and how is it relevant to local authorities?

The public sector equality duty (which seeks to eliminate discrimination from within a public body) has two parts: a general duty and a set of specific duties.

Not all public bodies are subject to both parts of the duty. Organisations which are not public bodies but carry out a public function as part of their work will be covered by the general part of the duty in relation to the exercise of that function. Local authorities are public bodies and are subject to both the general and the specific public sector equality duties. Some individual members of staff may exercise a public function in the course of their duties and when doing so will be subject to the general public sector equality duty. The public sector equality duty covers all the protected characteristics which apply in a services context.

### The general duty

The majority of public authorities are covered by the general duty.<sup>169</sup> The aim of the general duty is 'to ensure that public authorities consider how they can positively contribute to a fairer society through advancing equality and good relations in their day-to-day activities'.<sup>170</sup>

The general duty has three aims. It requires public authorities when exercising their functions and people exercising a public function in relation to that function to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct which is prohibited by the Equality Act 2010 advance equality of opportunity between people who share a protected characteristic and those who do not

<sup>169</sup> Equality Act 2010 Schedule 19, Part 2, as supplemented and amended by the Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011

<sup>170</sup> [http://www.equalityhumanrights.com/sites/default/files/essential\\_guide\\_to\\_the\\_public\\_sector\\_equality\\_duty\\_wales.pdf](http://www.equalityhumanrights.com/sites/default/files/essential_guide_to_the_public_sector_equality_duty_wales.pdf), para2.2

- foster good relations between people who share a protected characteristic and those who do not

### The specific duties

The purpose of specific duties is to 'help listed bodies in their performance of the general duty and to aid transparency'.<sup>171</sup>

The specific duties apply to listed bodies in Wales, with most devolved public authorities in Wales subject to the general duty<sup>172</sup> also being subject to the specific duties. The specific duties list the steps that local authorities must take to show they are complying with the general duty.

The specific duties in Wales require local authorities to publish objectives to enable them to better perform the general duty and a statement showing the steps taken or that it intends to take in order to fulfil each objective, together with provision for monitoring progress.<sup>173</sup> An authority had to publish its equality objectives no later than 2 April 2012 and thereafter must review its equality objectives within four years from when they were first published and at least once every four years subsequently.

## 7.7 Am I protected from discrimination because of my relationship with my disabled child?

You are protected from direct discrimination (and **harassment**) if you are treated less favourably than others because of your association with your disabled child by, for example, your child's service provider, education provider or your employer. This is known as 'discrimination by association', as referred to above.

<sup>171</sup> [http://www.equalityhumanrights.com/sites/default/files/essential\\_guide\\_to\\_the\\_public\\_sector\\_equality\\_duty\\_wales.pdf](http://www.equalityhumanrights.com/sites/default/files/essential_guide_to_the_public_sector_equality_duty_wales.pdf) section 3

<sup>172</sup> Equality Act 2010 (Statutory Duties) (Wales) (Regulations) 2011, Reg 3(1)

<sup>173</sup> Equality Act 2010 (Statutory Duties) (Wales) (Regulations) 2011, Reg 3(2)

# 8. Complaints: summary of potential remedies

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This section provides a general overview on how you can make a complaint in relation to the services received from, or decisions made by, local authority children social care services. The **Resources section on page 39** provides details on where to obtain further information and assistance.

## 8.1 Can I make a complaint if I am not happy with aspects of my child's care?

If you are concerned about any aspect of your child's care you have the right to complain. Such concerns might relate to the manner in which services are provided, the level of services offered to your child or your family, or a decision not to provide a particular (or any) service or not to respond to a request for an assessment of your child's needs or a failure to assess your needs.

## 8.2 What do I need to think about when deciding on whether, and how, to pursue a complaint?

The various complaints procedures that might be available to you are listed below. In addition, you may find it helpful to consider informal routes to raise your concerns. Often the most effective way of resolving such disputes will be through informal contacts with representatives of the relevant local authority. Involving your local MP, local councillor or even the local media, may add weight to your arguments. In general, it is important to make complaints without delay (and if court proceedings are contemplated, these may need to be made very quickly indeed – in which case expert advice needs to be taken urgently).

The best course of action to take is likely to depend on a range of factors, including the basis of your complaint and the likely costs of pursuing

a particular course of action. For example, while taking legal action by way of judicial review proceedings can lead to an early resolution, it is likely to be very expensive unless legal aid is available, and may not be appropriate if there are significant factual disputes.

## 8.3 How can I pursue my complaint?

The following complaints mechanisms may be relevant:

- **Children's social services provision:** You (as a person with parental responsibility) or your child can make a complaint to your local authority in relation to the discharge of its duties in relation to children with care and support needs and their families. The complaint should be made as soon as possible and in any event within 12 months.<sup>174</sup> Every local authority is required to have a special procedure for dealing with complaints about children's social care services, details of which should be available on its website.
- **Complaint to the Ombudsman:** The Public Services Ombudsman for Wales (PSOW) investigates complaints about the way local authorities have done something, or not something, or not done something they should have done<sup>175</sup> in areas relevant to social care. In most cases the complainant will be expected to have used the local authority's complaints procedure first. See the **Resources section on page 39** for further

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<sup>174</sup> Regulation 13 Social Services Complaints Procedure (Wales) Regulations 2014 SI 1794 (W. 187) and **Welsh Government A guide to handling complaints and representations by local authority social services (2014) para 58**

<sup>175</sup> <https://www.citizensadvice.org.uk/wales/family/looking-after-people/social-services-complaints-w/social-services-complaints-before-you-start-w/>

information.

- **Care and Social Services Inspectorate Wales:** The Care and Social Services Inspectorate Wales (CSSIW) regulates and inspects all care services in Wales.
- **Legal action:** You, on behalf of your child, can make an application to the High Court for judicial review if you consider that your local authority has acted unlawfully.

In relation to issues arising under the [Equality Act 2010](#) (see [section 7 on page 31](#)), discrimination claims may be made in the County Court. Claims in relation to the general public sector equality duty are brought by way of judicial review in the High Court. These can be brought by individuals, interested parties and/or the Equality and Human Rights Commission; the Commission can bring enforcement action in relation to specific duties. For more information about the procedure and time limits see the [Resources section on page 39](#).

**Please note:** If you are considering taking legal action you should seek legal advice immediately as the time limits are often very strict and short.

# 9. Glossary

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**Adult:** person who is aged 18 or over.<sup>176</sup>

**Carer:** person who provides or intends to provide care for an adult or disabled child.<sup>177</sup>

**Carer assessment:** the assessment which must be carried out by the local authority where it appears that a carer may have needs for support. The assessment must consider whether the carer does in fact have needs for support (or is likely to do so in future), and, if the carer does, what those needs are (or are likely to be in future).<sup>178</sup>

**Child:** person who is aged under 18.<sup>179</sup>

**Disabled:** a person is 'disabled' if the person has a disability for the purposes of the Equality Act 2010, i.e. if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

**Eligibility criteria:** these are the criteria used by local authorities to decide if the person's 'needs' are such that they qualify for the provision of care and support. The eligibility criteria regulations create a four stage process as set out in **section 3.14 on page 17**.

**Equality Act 2010:** the Act provides a legal framework to protect the right of individuals by tackling disadvantage and discrimination.

**Human Rights Act 1998:** this Act places an obligation on public bodies such as local authorities to work in accordance with the rights set out under the European Convention on Human Rights ('ECHR'). This means that individuals working for public authorities, whether in the delivery of services to the public or devising policies and procedures, must ensure that they take the ECHR into account when carrying out their day to day work.

**Local authority children's social care services:** this term is used to describe the department of the local authority that is responsible for the provision of services to children in need of care and support (including disabled children). In Wales, the authorities often divide the responsibility for the provision of social care to disabled people between a children's services department and an adult social services department.

**Looked after child:** a child who is either in the local authority's care (i.e. subject to a care order or an interim care order), or who is provided with accommodation by the local authority for a continuous period of more than 24 hours in the exercise of any of its social service functions.<sup>180</sup>

**Mental Capacity Act 2005:** the MCA 2005 provides the legal framework for making decisions on behalf of individuals aged 16 or over who lack capacity to make such decisions for themselves. Anything done for, and any decision made on behalf of, a person without capacity should be done or made in the 'best interests' of that person. For individuals aged 16 and over who lack capacity to make decisions for themselves, the Mental Capacity Act 2005 provides that 'acts in connection' with the person's care and treatment can be taken in the person's 'best interests'. In order to determine what might be in the person's best interests, those involved in caring for the person (such as the parents) should be consulted. For further information see: <https://www.gov.uk/government/collections/mental-capacity-act-making-decisions>

**Non-statutory guidance:** practical guidance aimed at helping people understand their rights and obligations under the relevant Act. Although it has no legal standing, it is something to which the local authority must have regard when carrying out their functions, and if they intend not to follow the guidance, they will have to be able to provide good reasons for so deciding.

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176 S3(2)  
177 S3(4)  
178 S24(1)  
179 S3(3)

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180 S74; and Part 6 Code, para 112

**Parental responsibility:**<sup>181</sup> this is a term defined in section 3 of the Children Act 1989 as 'the rights, duties, powers, responsibilities and authority which by law a parent has in relation to a child and his property'. Those working with children will need to ascertain who has 'parental responsibility'. This will be particularly important when the child is not able to make decisions about his or her care or treatment as in those circumstances a person with parental responsibility may be able to make that decision on behalf of the child.

Usually both parents will have parental responsibility, but unmarried fathers will need to take steps to acquire parental responsibility. In some cases, parental responsibility may be shared with others, for example when the child or young person is subject to a care order the local authority will share parental responsibility with the parents (if both have parental responsibility).<sup>182</sup>

**Social Services and Well-being (Wales) Act 2014:** the key legislation setting out the legal framework for the provision of social care for individuals in Wales.

**Statutory guidance:** guidance that has been approved by the Secretary of State and laid before Parliament. It is not an authoritative statement of the law. However, it can be used as evidence in court or tribunal proceedings connected with the relevant legislation and the court/tribunal must take into account any part of the guidance it considers relevant when determining the questions arising.

**Victimisation under the Equality Act 2010 in a services context:** if a service provider subjects a service user or a person seeking to access a service to a detriment because they have carried out or the service provider believes they have or may carry out a 'protected act' this amounts to

victimisation of the service user or the person seeking to access the service.

A 'protected act' is:

- Bringing proceedings under the Equality Act 2010 (the Act)
- Giving evidence or information in connection with proceedings brought under the Act
- Doing anything else for the purposes of or in connection with the Act
- Making an express or implicit allegation that another person has done something in breach of the Act (whether or not an allegation is later dropped).

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181 Children Act 1989 S3 (applies to England and Wales)

182 Local Authority Social Services Act 1970 amended by the Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016, explanatory note (para 6 (re Part 8, page 2))

# 10. Resources

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## Useful Organisations

### Carers UK

A charity set up to help people who care for family or friends. Its work includes providing information and advice about caring: <https://www.carersuk.org/>

### Children's Commissioner for Wales

The Children's Commissioner supports children and young people to find out about children's rights, listens to children and young people to find out what's important to them, advises children, young people and those who care for them if they feel they've got nowhere else to go with their problems, and speaks up for children and young people nationally on important issues: <https://www.childcomwales.org.uk>

### Citizens Advice Bureau

A source of advice and support if you want to complain about social services or local authorities: <https://www.citizensadvice.org.uk/wales>

### Contact

Provides support, information and advice to families of disabled children:

<https://contact.org.uk/>

### Equality and Human Rights Commission (EHRC)

Its role is to promote and monitor human rights; and to protect, enforce and promote equality across the nine 'protected characteristics' under the Equality Act 2010—age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation: <http://www.equalityhumanrights.com/en/commission-wales>

### The Law Society

Has a directory of solicitors, Find a Solicitor, which empowers people to find local solicitors who specialise in specific practice and who hold Law Society accreditations:

<http://solicitors.lawsociety.org.uk>

### Public Law Project (PLP)

An independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. Its website includes a guide to making a complaint: <http://www.publiclawproject.org.uk>

### Public Services Ombudsman for Wales (PSOW)

Looks into complaints about public services and independent care providers in Wales, including looking into complaints that local authority members have broken their authority's code of conduct. The Ombudsman is independent of all government bodies and the service is impartial and free of charge: <http://www.ombudsman-wales.org.uk>

## Further information and guidance

For information on other topics such as education, please refer to the Guides for Parents available on Cerebra's website: <https://cerebra.org.uk/get-advice-support/parent-guides/>

For guidance on advocacy services: <http://www.nhs.uk/Conditions/social-care-and-support-guide/Pages/advocacy-services.aspx>

## Complaints

Public Services Ombudsman for Wales' factsheet on making a complaint about a public body:

<https://www.ombudsman.wales/fact-sheets/complaints-against-public-bodies-our-procedure/>

Information provided by the Government Equalities Office on the process for complaints under the Equality Act 2010: <https://www.gov.uk/guidance/equality-act-2010-guidance>

Information about disability discrimination under the Equality Act 2010 is also available on the EHRC's website, together with their Equality Advisory Support Service: <https://www.equalityhumanrights.com/equality/equality-act-2010/your-rights-under-equality-act-2010/disability-discrimination>

## Equality Act 2010 and social care services

Equality and Human Rights Commission, Services, Public functions and Associations: Statutory Code of Practice: <https://www.equalityhumanrights.com/equality/equality-act-2010/codes-practice/services-public-functions-and-associations-code-0>

Government Equalities Office, Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) <https://www.gov.uk/government/publications/disability-equality-act-2010-guidance-on-matters-to-be-taken-into-account-in-determining-questions-relating-to-the-definition-of-disability>

Equality and Human Rights Commission, Technical guidance on the Public Sector Equality Duty: Wales <https://www.equalityhumanrights.com/guidance/public-sector-equality-duty/technical-guidance-public-sector-equality-duty-wales>

## Legislation, Regulations, Codes of Practice, Statutory Guidance and Conventions

Social Services and Well-being (Wales) Act 2014: <http://www.legislation.gov.uk/anaw/2014/4/contents/enacted>

Social Services and Well-being (Wales) Act 2014 Regulations: <https://socialcare.wales/hub/sswbact-regulations>

Social Services and Well-being (Wales) Act 2014, Codes of Practice and Statutory Guidance:

<https://socialcare.wales/resources/code-of-professional-practice-for-social-care?record-language-choice=en-cy>

United Nations Convention on the Rights of the Child: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

United Nations Convention on the Rights of Persons with Disabilities: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

## Legal references

Steve Broach, Luke Clements, and Janet Read, Disabled Children: A Legal Handbook, LAG & Council for Disabled Children, 2016. Available online at <https://councilfordisabledchildren.org.uk/help-resources/resources/disabled-children-legal-handbook-3rd-edition>

Luke Clements, The Social Services & Well-being (Wales) Act 2014: An overview. Available online at <http://www.lukeclements.co.uk/?s=well+being+act+>

## National Service Frameworks for Children

Welsh Government, National Service Framework for Children, Young People & Maternity Services (2005): <http://www.wales.nhs.uk/sites3/documents/441/33519%20Main%20Doc%20Complete%20LoRes.pdf>



# NHS Continuing Healthcare

Children and Young People's Continuing Care  
Guidance Welsh Government, 2012: <https://gov.wales/sites/default/files/publications/2019-06/children-and-young-peoples-continuing-care-guidance.pdf>

## Carer's Assessment

Carers Wales, Assessments: A guide to getting an assessment in Wales from April 2016:

<https://www.carersuk.org/wales/help-and-advice/factsheets-carers-wales/getting-an-assessment-in-wales>



## About the Authors

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Sarah qualified as a solicitor in 2009, joining Scott-Moncrieff and Associates Ltd as a consultant in 2016. Sarah specialises in best interests work in the Court of Protection where she represents clients in proceedings on health and welfare issues. Such issues include residence, contact, care and treatment where people do not have the mental capacity to decide on these issues for themselves. Clients include those without capacity, children, parents, relatives and the Official Solicitor. Sarah also specialises in deprivation of liberty, Human Rights Act and disability discrimination claims.

The findings of this report are those of the author, not necessarily those of Cerebra.

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# Working wonders for children with brain conditions

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