Accessing Public Services Toolkit:

A problem-solving approach

UNIVERSITY OF LEEDS

CEREBRA
Working wonders for children with brain conditions

Working wonders for children with brain conditions

Families where a child has a brain condition face challenges every day. Just to learn, play, make friends and experience the world can feel difficult, even impossible. But we don't believe there's any challenge that can't be overcome.

So we listen to families, we learn from them. We carry out research, we design and innovate, we make and share. From new equipment to new learning resources, to new ways to play and support each other, everything we find out together makes life better. It opens doors to discovering the world.

It's an incredibly rewarding journey for everyone involved. Why not be a part of it? You never know what we'll discover together.

www.cerebra.org.uk

Our guides for parents help you find the answers you need. You can view and download the full series of our guides and factsheets completely free from our website www.cerebra.org.uk.

If you would like to make a donation to help cover the cost of producing our guides give us a call on 01267 244216 or donate at https://cerebra.org.uk/get-involved/donate/.

Thank you.

Contents

Introduction 5

Categories of dispute 6

Myth Buster 7

Key factors 8

1. Inter-agency disputes 13

2. No such word as "can't" 14

3. The budget is spent 15

4. The panel/manager says "no" 16

5. Too difficult to think about 17

6. Delay 18

7. "I don't have authority to ..." 19

8. Personalities 20

9. Highly contested fact disputes 21

Preparing for a meeting 22

Jargon Buster 23

What must public bodies do? 28

Precedent letters 29

Real Snakes and Fantasy Ladders 34

Written by Luke Clements

Illustrations by Gillian Clements

This toolkit emerges from a research programme funded by the charity Cerebra. Cerebra is the charity dedicated to helping families with children with brain conditions discover a better life together.

In the writing and editing of this toolkit we have benefited greatly from those who have helped develop the ideas in the Guide, and provided constructive feedback on the drafts. We are particularly grateful to Alison Thompson, Claire King, Dawn Cavanagh, Karin Crimmins, Lisa Reakes, Marie Macey, Sian Taylor and Wendy Merchant, our Cerebra Family Research Ambassador pilot members.

Very special thanks are also due to:

- Tracy Elliott, Beverley Hitchcock and Carys Hughes and all Cerebra colleagues who have helped us overcome teething problems and throughout have been wonderfully positive and imaginative;
- Professor Julie Price, Jason Tucker and Sharon Howley of Cardiff Law School; and
- Glenn Storhaug for his skill in manipulating the graphics.

© Luke Clements, Cerebra Professor of Law and Social Justice, Leeds Law School, Leeds University.

First published in 2016 with financial support from Cerebra and the Economic and Social Research Council (ESRC).

This is the third edition of the guide. We need your comments, criticisms and advice on how it can be improved: particularly on what you have found to 'work' when trying to solve a problem you have encountered with a statutory body, such as social services, the NHS and the education service.

Please send your comments and suggestions to Professor Luke Clements at: L.J.Clements@leeds.ac.uk

Introduction

This guide aims to support disabled people and carers, as well as their families and advisers, who are encountering difficulties with the statutory agencies in relation to the provision of health, social care and education support services.

UK law provides powerful rights to such support services, but this alone is insufficient. The law can be complicated and difficult to understand. Even when you know what your rights are, it can be daunting, exhausting and sometimes intimidating to challenge public officials. There is a power imbalance and much research establishes (and indeed the Government accepts) that many families are fearful that complaining may make things worse.

This guide aims to help unpick these problems, to develop effective strategies for resolving them and to keep your blood pressure within safe limits. It is based on the idea that it is not in the interests of public bodies to have these commonly occurring problems and that most such problems are capable of being resolved without lawyers and without great expense to the public body.

In the pages that follow, this toolkit considers nine general categories of dispute, suggests how these can be resolved and identifies key factors that empower people to claim their rights and to challenge failures when they occur.

Categories of dispute

It is important to consider your problem from the perspective of the public body in order to understand why it may have arisen: what is it about the case that creates the particular difficulty? Different types of problem generally require different problem-solving approaches. The categories listed below are considered in greater detail in the subsequent pages of this toolkit.

1. Inter-agency disputes

In disputes of this kind, the problem is not whether the disabled person or carer has an eligible need, but which agency is responsible (see page 13).

2. We don't do/we can't do that

The public body has a rigid policy – 'we don't do this' – we 'can't do that' (see page 14).

3. The budget is spent

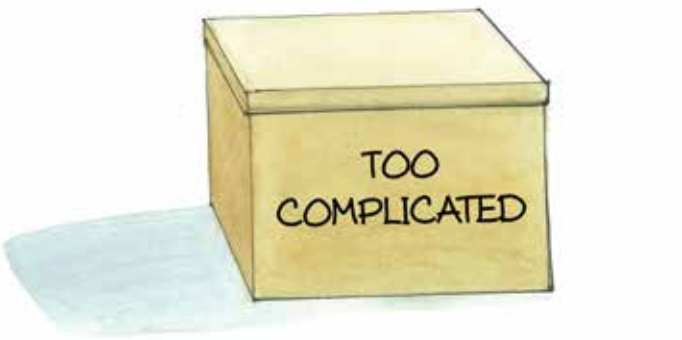
It is agreed that the disabled child/carer has a need, but the public body won't meet that need because of a 'shortage of resources' (see page 15).

4. The panel (or manager) says "no"

The person you deal with is sympathetic, but their manager or a 'panel' says "No" (see page 16).

5. Too difficult to think about

The case is complex and needs an 'out of the ordinary' response but this requires skills that the public body lacks or it simply has insufficient time to devote to it (see page 17).



6. Delay

The public body is not dealing with the problem – perhaps because staff have excessive caseloads; are going off sick; are short term 'agency' staff etc (see page 18).

7. "I don't have authority to..."

There is general agreement that the disabled person/carer has needs which should be met – but no-one has the power to make it actually happen (see page 19).

8. Personalities

A personality clash: the decision maker has autocratic tendencies and/or the public body has labelled the disabled child/carer as 'difficult' (see page 20).

9. A highly contested fact dispute.

This often occurs where there is a 'history' to the dispute and the facts are hotly contested by both sides (see page 21).

Myth Buster

Many people who work for public bodies and many parents of disabled children misunderstand the law. Many 'myths' develop – a few of which are listed below – and each of these is considered in subsequent pages.

- you have to have a diagnosis to get support (page 24);
- you can't get school transport if you live within three miles of the school (page 27);
- if your IQ is 70 or more you can't get help (page 25);
- CAMHS don't support children with Autism or ADHD (page 23);
- children with disabilities get 2 hours respite a week (page 27);
- you can't get a Disabled Facilities Grant (DFG) if you live in rented property (page 24);
- you don't have a right to Direct Payments (page 24);
- you can't pay your relatives with a Direct Payment (page 24);
- there is a maximum number of hours you can get with a short break/Direct Payment support (pages 24 and 27);
- you don't get help with travel costs if you are receiving the mobility component of DLA or PIP (page 27);
- there is an upper limit on the amount of a personal budget (page 26);
- you don't have a right to a separate carer's assessment (page 23).

Key factors

(1) Support

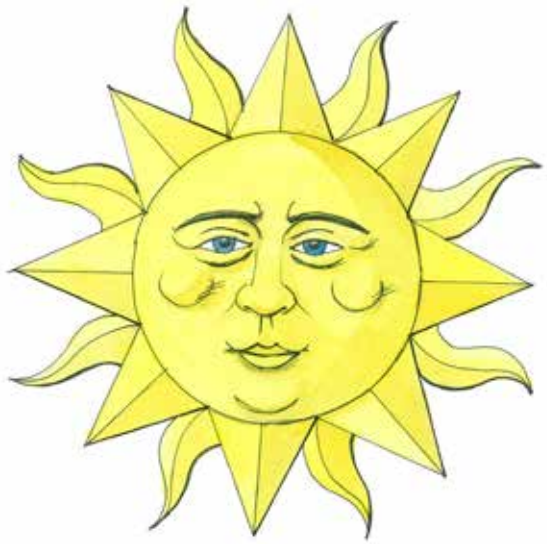
Our preliminary research suggests that having support is generally the most important factor: emotional support; support in advising how to proceed; support in the sense of 'external validation'; support in empowering you to persevere – and so much more.

Simply being told that you are being treated badly is an enormous help. It validates your experience and makes you realise it's not you being unrealistic. Knowing that other people have experienced the same problem and considered it unreasonable can challenge a sense of isolation – that you are not alone with this particular problem.

The internet has proved to be one of the greatest advances in support over the last 20 years. For anyone in need of advice and support, an excellent first step is to use social media/support forums/self-help groups through Facebook; Twitter; Mumsnet; Contact a Family and so on. Simply posting a question such as "Has anyone ever had this problem ... " or "Does anyone have any advice on what to do about ... " etc will often produce a lot of responses – many probably not terribly useful – but among these will often be an answer or a link to a resource that helps. However, the fact that people respond is just as important– that people empower you and encourage you to persevere. It is this factor that our preliminary research has identified as one of the most crucial elements in helping to overcome many of the daunting barriers that people encounter when trying to access decent support services.

(2) Knowing your rights

Knowing what you and your child are entitled to is of great significance: it is empowering and creates a sense of legitimacy – that you are not seeking special treatment or making unreasonable claims. The way this knowledge is communicated to the public body is of great importance (see key factors 7 and 9 below). It can empower sympathetic colleagues who would like to help advance your case and can often 'illuminate'; not everyone is an expert on the law – even those who work in education, health and social care bodies. In addition to the jargon buster (page 23), the website mentioned on page 7 aims to help you better understand your rights.



(3) The letterhead effect

Our research also indicates that if you can have support from a person or organisation with some status – and one with a 'letterhead' – this too makes a significant difference. Not infrequently we have seen public bodies fail to act on excellent letters written by families – letters that describe in detail: (1) the nature of the problem they face; (2) the relevant law and policy; and (3) what has been done wrong and what corrective action needs to be taken. When, however, the same public body is sent a parallel letter on the letterhead of a respected Law School or charity, MP or head teacher then often things change.

Our research has not yet identified exactly why support from a third party has the potential to make such a difference.[1] Relationships between officers and parents can often be long-standing and complex, and it may well be that the

1 Academically this is referred to as 'credentialism' – ie an excessive reliance on credentials.

observations of a 'neutral bystander' can create an opportunity for the public body to look again and more objectively (or from a different perspective) at a particular situation.

One useful technique to obtain such validation from a third party is to write to them asking a question you already know the answer to (i.e. 'is it unlawful for an authority to have a blanket policy not to provide .... '). The involvement of a third party can also help you think 'objectively' about the particular problem. It can help you to be more organised and to focus on the core concerns (and to put to one side peripheral issues – see key factor 8 below).

(4) Get it in writing

It is vital to keep written records, to make diary notes and to get the public body to 'put in writing' what it is saying. The facts of your situation – the evidence of what your needs are and the harm that may result if these needs are not met – are crucial. Mahatma Gandhi (who was a barrister in his early years) believed that if you 'take care of the facts of a case, the law will take care of itself'. Although our preliminary research suggests that this may not always be the case, it is nevertheless sound advice.

A case based on strong evidence is much more likely to succeed than one where the evidence is weak. It is, however, important to get the facts written down and if possible to get third parties (e.g. friends, family, neighbours, MPs, councillors, priests, nurses, teachers, support staff and professionals) to write letters endorsing this evidence and spelling out how important it is that the public body acts in the way you want it to.

(5) Recording key dates and promises

Delay is one of the greatest problems people face in accessing their statutory entitlements. Things 'drift': people go on holiday; people go off 'sick'; people change jobs; and unexpected things happen like the summer holidays, 18th birthdays and Christmas. Promises made in good faith are not honoured for all sorts of understandable reasons and are then replaced by other equally well-meant undertakings – which again don't materialise. In this way months – indeed years – may pass and you are still waiting. But your needs don't wait: children don't stop growing, children don't hang around while the public body gets itself sorted. By the time the public body finally gets its act together your needs will probably have changed and you will then be told there must be a reassessment of the situation.

You are then in familiar territory – an 'impossible position'. Do you go back to square one and start the process anew or refuse and be branded uncooperative? We have a precedent letter for this situation (see page 33) – but it is an unenviable dilemma and best avoided by challenging 'drift' as soon as you can. This means making diary notes of dates by which agreed action is to be taken and challenging any failure to meet these deadlines. 'Drift' happens when deadlines are missed but everyone hopes and believes that the problem will be addressed – and so in its initial stages it goes unrecorded. Generally it is sensible to complain early (but politely): at page 29 we have a precedent letter to deal with this.

(6) Recording 'things said'

Not infrequently you may be told something by a public official – in a telephone conversation or during a meeting–that is either crucial or troubling (or both). It might be a promise that something will be done or a statement to the effect that your request is simply out of the question: that "we don't do ...". As this guide notes (see page 14), public bodies are seldom able to use the 'can't'/'don't' words. There is little that they can't do – and it is generally unlawful for them to have 'blanket' policies. Sometimes a throwaway comment may sound like a threat: for example, "if you do that we may withdraw your services" or "we are under no obligation to care for your son, you know" or "if we give it to you we have got to take it away from someone else".[2]

Whenever such a crucial or troubling comment is made, it is important to get this confirmed in writing. This can be difficult as public bodies may be reluctant to do this. In such cases a letter or an email along the lines of precedent letter number 3 on page 31 of this guide can be effective, since it will be evidence of what was said (unless a response is received from the public body clarifying the position).

(7) Putting it succinctly

When asking a public body to do something or when making a complaint, it is important to set out as succinctly as possible, the key facts, the key problems and what you want to happen. While it is important to identify past failures, it is generally best to devote most energy in spelling out what you require to be done. We can debate what the average human attention span is (some research suggests it is shorter than a goldfish's) but many of us glaze over when confronted by a long email or by a letter of more than a page or two (and we frequently put it 'on the side of the desk'–see page 17).

Letters and emails should be as short as possible and structured (using numbers or bullet points for lists etc). If possible, condense your case into one or two pages – and if needs be, have an annex where the detail is set out at greater length. The letter should identify:

- the problems;
- the key facts;
- where the public body has gone wrong (briefly);
- what it needs to do to put things right;
- a reasonable timescale in which this should be done; and (if relevant)
- the action that needs to be taken in the short term whilst this corrective action is being taken (i.e. interim services/support).

The precedent letters at the end of this toolkit and also the more extensive library of template letters on the Cerebra website[3] are useful examples of letters that can be written to public bodies, including how they can be asked to take action to remedy a particular problem.

(8) Parking peripheral questions

This toolkit emphasises the importance of considering a case from the perspective of the public body: appreciating the pressure staff are working under, both in terms of caseloads and the diktats they receive from their senior officers

2 These are examples taken from Ken Simons "I'm not complaining. But ..." (Joseph Rowntree Foundation 1995).

3 See https://www.cerebra.org.uk/help-and-information/legal-help/precedent-letters/.

and members. Seeing the issue from a different perspective can help identify the particular barrier that is blocking a resolution. The process is generally easier when there is a willingness to accept that the public body's approach might not be unreasonable, for example, if it disagrees about some of the evidence. As we note on page 21, one of the most difficult types of case to deal with is where the evidence is 'highly contested'.

In order to avoid getting into this situation it can be helpful to 'put to one side' (or 'to park') disputed facts which are not of central relevance to the solution. For example – the fact that a staff member alleges they returned a telephone call (when you are sure they didn't) may be infuriating – but it is unlikely to be central to the issue of when the authority is going to do what you want them to do. The key aim is to get the support and if this can be done by agreeing 'to park' a particular disputed issue, then this should be considered. This does not mean accepting that the public body is right – it merely requires that for the purpose of getting a solution, this can be left to one side, to be considered at a later date (if needs be).

(9) Helpful words/quotes

The research programme's preliminary findings suggest that there are some words/quotes that can be particularly useful to use (but not overuse) in letters/emails.

Snippets of law

Quoting a snippet of law or government policy seems to make a difference in many cases. It is a bit like showing the 'instruments of torture': in effect communicating to the public body that you are aware of the law and if things are not resolved, then this is an option you might consider. The aim of this toolkit is to avoid having to 'go to law' – having to resort to the unpredictable, expensive, time-consuming and frequently disempowering legal system. However, the law is important and a short legal reference will not go amiss. The following pages of this toolkit have a few footnotes quoting legal extracts. These are the type of 'snippet' that might be included in a letter.

A cautionary note however: quoting the wrong law or too much law can have the opposite effect – council staff may 'glaze over' and assume (if the law is misquoted) that the rest of the letter is irrelevant too, or that it's too difficult an issue to deal with.

Maladministration

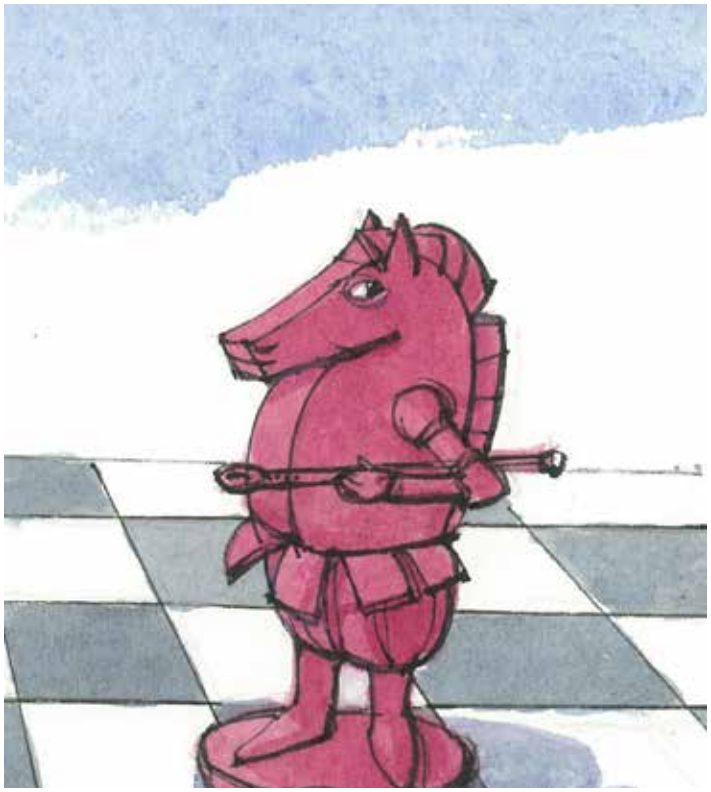
'Maladministration' can be a useful word to use, not least because most spellcheckers can identify it! As we note in the jargon buster (page 23) it means that the Ombudsman (on page 25) would consider the behaviour of the public body to be unreasonable. The Ombudsman is not someone public bodies want to irritate – they must publicise any Ombudsman finding against them and the Ombudsman can recommend substantial compensation. There is no fee for complaining to the Ombudsman and if the investigator chooses, he or she can go to the public body's office and look through their records, which is something many of us would not relish if done to us.

Fettering of a discretion

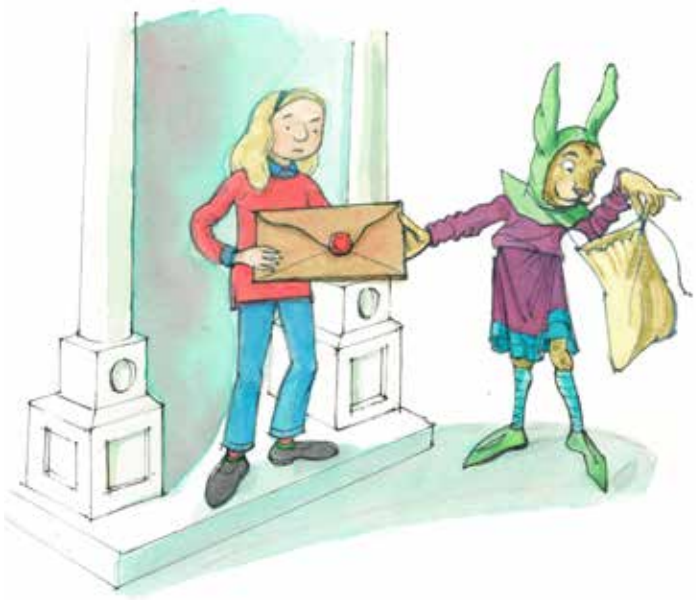
This is a useful phrase to use where a public body has a fixed policy – i.e. 'we don't do'/'we can't do that'. This is considered further on page 14 (and see jargon buster page 24).

Monitoring Officer

Some of the precedent letters referred to in this toolkit and the further resources (see page 7) make mention of the local authority's 'Monitoring Officer'. As the jargon buster explains (page 25), every local authority must have such a person – whose job is to ensure that their authority does not act in a way that might amount to maladministration. By addressing a letter to the Monitoring Officer you are not only communicating the fact that you are aware of the law, but also that you require a council lawyer (Monitoring Officers are usually solicitors or barristers) to review your problem. Most complaints made to public bodies are not routinely considered by their lawyers: they are dealt with by officers in the particular department. Not infrequently on seeing the letter, the lawyer will explain to their departmental colleagues that they have misunderstood the law/applied an outdated policy etc. Provided the letter making the representation has been drafted in reasonable terms (i.e. giving the authority scope for changing its decision without loss of face) this can be effective and result in an early resolution.



In the Cerebra research we have come across public bodies that have applied inflexible policies concerning (for example) the provision of continence pads or school transport for disabled children.[4] In these cases the persons who made these decisions most probably believed that they were applying the law/policy correctly. It was only when the policy was considered by the public body's lawyer that she or he learned that they were mistaken about the law/policy in question.



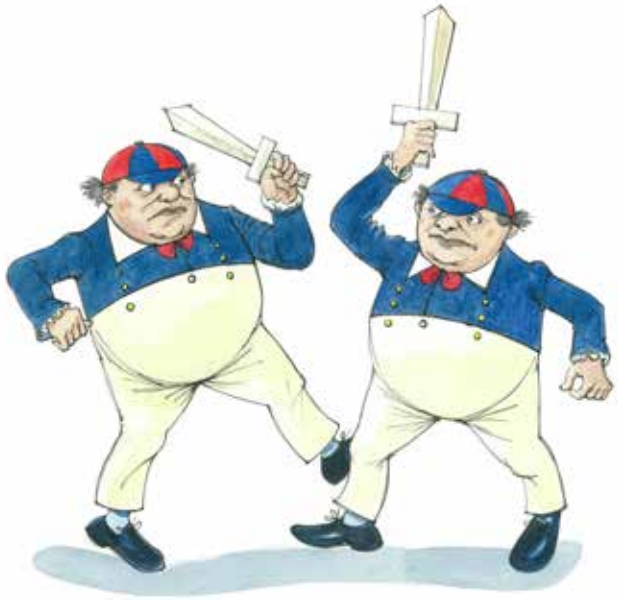
4 See for example Cerebra Legal Entitlements Research Project Digest of Opinions 2013 'Jinny's Story' (access to Continence Services) and 'Claire's Story' in the 2014 Digest (School Transport) both accessible at https://cerebra.org.uk/wp-content/uploads/2019/07/2013-Summer-Autumn-Digest-FINAL1.pdf

1. Inter-agency disputes

In disputes of this kind, the problem is not whether the disabled person or carer has an eligible need, but which agency is responsible. It might be different departments within the same authority arguing about which of them is responsible, or a dispute between different authorities, or between the local authority and the NHS, or disputes between different NHS bodies – the permutations are endless. It might also be an argument between a public body and a private provider who was supposed to provide the support services (but has failed). The argument is often about 'who pays' and some managers seem to thrive on such disputes – since they are about 'defending my budget'. Disputes of this kind can drag on for long periods during which the disabled person or carer feels like a powerless bystander.

How do you solve this? You could of course try and work out which authority is responsible, but this may be complex, involving (for example) concepts such as 'ordinary residence', 'responsible commissioners', delegation and contract law. You could decide to move to Belgium, but you would find that these problems exist throughout the world – they are central to all bureaucracies.

Where the argument is between two public bodies, our preliminary research suggests that the most effective response is to make a complaint that they are 'failing to work together'. It is generally pointless to try and work out which one is actually responsible: this is not your job – it is for them to sort this out. This is the approach the Ombudsman took when considering a dispute between an NHS body and social services department. She found that they had acted unreasonably – that one of them should have 'grasped the nettle' and secured the support, before entering into protracted negotiations with the other on liability for the care costs.[5]



Even when it is reasonably clear which body is responsible, it will still be unreasonable for the other body to simply 'walk away' if it knows that the responsible body is not behaving properly. In such a case the High Court considered that it was 'an inexcusable failure of good social work practice to 'wash its hands' of the family in this way'.[6]

The only exception to this approach is where the dispute is between a public body and the private provider it commissioned to provide your support. In such cases it is the public body to which the complaint should be made – it is responsible even though it chose to delegate this to a private agency.[7]

Proposed solution

Don't try and work out who is responsible – complain about them both for not working together, for not 'grasping the nettle'. A precedent complaint letter is at page 30.

5 Complaint no 96/C/3868 against Calderdale MBC 24 November 1998 para 30.

6 *R (AM) v (1) Havering LBC and Tower Hamlets LBC* (2015) EWHC 1004 (Admin) para 46.

7 The Ombudsman has, for example, criticised a council for failing to monitor properly a care agency contract which she considered placed 'the most vulnerable members of the community at serious risk' and was 'simply unacceptable and constitute(d) maladministration': complaint no 05/C/08592 against Liverpool CC, 17 January 2007, paras 30–31.

2. No such word as "can't"

Public bodies have wide powers to provide all manner of support for disabled people and carers. The various Acts that cover education, health and social care support place few limitations on what can be done. This means that they are not allowed to have 'blanket policies' about what they won't do – unless the law permits this. In a few cases the law does restrict what can be done – e.g. social services cannot provide certain health services and there are limitations on what can be done for people subject to immigration controls.

If an Act states that authorities have a duty to provide a range of services to support disabled children,[8] or that the NHS should be a comprehensive service,[9] then it is generally unlawful for a public body to have a fixed policy of not doing something or other. In legal language this is referred to as a 'fettering of a discretion'.

The Cerebra research programme has encountered many examples of such inflexible policies of this kind,[10] including:

- we can't do this for 6 months;
- we don't provide child care to enable you to stay in work;
- we don't do separate parent carers assessments;
- we don't provide respite care at the weekends/ in the evenings;
- our department doesn't fund residential placements;
- due to cutbacks we don't provide this anymore;
- we don't provide transport if the school is less than 3 miles from your home;
- we don't provide more than four continence pads per day.

When front line workers explain that this or that "can't be done", they are probably unaware that this is wrong – it is simply that their council/NHS body has got into bad habits and they don't realise that what it has customarily done is actually unlawful.

8 Which the Children Act 1989 (s17) in England and the Social Services and Well-being (Wales) Act 2014 (s37) in Wales do require.

9 Which the NHS Act 2006 (s1) in England and the NHS (Wales) Act 2006 (s1) do require.

10 Examples of this kind are given in J Read and L Clements, Disabled Children and the Law (Jessica Kingsley 2001); and J Morris, 'They said what?' (Joseph Rowntree Foundation 2004).

Proposed solution

The first step is to 'get it in writing'. Generally this will require a letter/email along the lines of precedent letter number 3 at page 31. This refers to the "we don't do" / "we can't do that" comment and then requires that the public body clarify what its policy is. The letter serves two purposes: it is evidence that something was said and it also gives the public body an opportunity to 'backtrack' and to explain that there is no such 'rigid' policy. Sometimes it will state that 'in general' it will not do (whatever it is), but that in appropriate/exceptional circumstances it is prepared to do this.

This will then require a clarification as to what it means by 'appropriate/exceptional' and also for evidence as to when it has in fact done this. The Courts and Ombudsmen are wary of public bodies that say that their policies are flexible, but can't point to any evidence of flexibility in practice. In such a case the High Court noted that the public body had been unable to provide any 'convincing evidence that at any material time they had an exceptions procedure worth the name. There is no indication that there was a genuine willingness to consider individual cases'.[11]

11 *R v Bexley LBC ex p Jones* (1995) ELR 42, p55.

3. The budget is spent

The problem is all too common: the public body agrees that the disabled person/carer has a need, but refuses to meet that need because of a 'shortage of resources'. Not infrequently the immediate shortage is not of money but of physical resources – for example a lack of respite care places or trained staff. It can also arise with support services being reduced because (for example) "our budget has been cut" or simply that "a reassessment is necessary as we have to cut your support because of our financial problems".[12]

Unqualified statements of this kind are unlawful.[13] Unless the Act says otherwise, the law 'trumps' resources: Parliament is supreme and if it places a statutory duty on a public body to do something, then it has to do it (and if truth were told, public bodies have always claimed to be short of money). Once a local authority decides that someone has eligible needs, then in general these

needs have to be met 'regardless of resources'. Sometimes the law is less rigid, particularly when the duty rests with the NHS.[14] In such cases there is still a requirement to meet eligible needs, but if there are compelling resource problems and the needs are not urgent, then the law allows for some flexibility. However, a public body will be required to give rational reasons for its decision, demonstrate that it is taking active steps to address the shortfall and (if possible) in the short-term to put interim support measures in place.

12 The English guidance states, for example that 'review must not be used as a mechanism to arbitrarily reduce the level of a person's personal budget'– Department of Health, Care and Support Statutory Guidance 2014 (para 13.4).

13 The English guidance states, for example that a 'local authority's finances are relevant when it decides how to meet the eligible needs of an individual 'but not whether those needs are met' (para 10.27).

14 However in England an NHS support service listed in an Education Health and Care Plan must be provided regardless of resources – Children and Families Act 2014, section 42.

Proposed solution

As is so often the case, the first step is to 'get it in writing': to dispatch a letter/email which not only refers to what was said, but also challenges the right of the public body to reduce services (or fail to meet an eligible need) for the sole reason of budget difficulties.

Budgets are a 'political' as well as a legal issue – so it is often worthwhile to write to (and arrange for a meeting with) your local councillor, cabinet member, MP and (if appropriate) to use the local media (press/radio/TV etc).

If the problem concerns a lack of physical resources, (e.g. insufficient therapists, or places at an after-school club or a respite care centre) the solution may be to require the public body to implement a process that will result in it being overcome and to develop a 'plan of action' with a timeline for what a 'reasonable body' would do in such cases to address the problem – see precedent letter number 6 on page 32. In such cases it can also be effective to suggest a solution: i.e. identify an agency that is able to meet the identified need or to suggest that the public body make a direct payment which would enable you to purchase the relevant support service.

4. The panel/manager says "no"

Many local authorities use 'panels' of various types (sometimes termed 'allocation panels', 'funding panels' or 'purchasing panels') as a means of rationing services. Often a front line staff member will have spent a considerable amount of time assessing a disabled person's/carer's needs and will propose a care plan which is then overruled by a panel or a senior manager. This is generally unlawful, since assessed needs must normally be met, regardless of resources (see previous page).

When asked to consider cases of this kind, judges and Ombudsmen have generally asked why the manager or panel set aside the staff member's assessment: what was their special knowledge of the case that gave them the right to overrule the assessment of the staff member? Not infrequently the panel/manager may:

- have spent little or no time with the person;
- not seen or experienced their environment;
- not spoken to concerned third parties;
- not read all the background and supporting evidence and so on.

Judges and Ombudsmen want to know therefore what the evidence was that enabled the panel/manager to overrule the professional judgement of the staff member who had actually seen and assessed the person and read all the relevant papers.[15]

Proposed solution

As is so often the case, the first step is to 'get it in writing': to get in writing exactly who decided what and for a complaint to be made challenging the manager's/panel's decision. Precedent letters on pages 29 and 31 can be adapted for this purpose.

15 For details of some of these Court and Ombudsman cases – see 'Council Funding Panels' at www.lukeclements.co.uk/resources/

5. Too difficult to think about

The disabled person needs (for example) a complex package and this requires coordination and planning skills that the public body appears to lack. This is sometimes characterised as the 'file pushed to the end of the desk' problem – or the email that lingers in the inbox for weeks on end. The net effect is delay. This is a common problem (we all tend to put off difficult questions) and one that is particularly difficult for local authority/NHS staff who have excessive caseloads and who are spending their time fire-fighting and dealing with a backlog of urgent cases.

Proposed solution

Instead of demanding that the public body makes a decision on what to do, it often works to suggest what the solution could be (and, if possible, to give an example of where this type of solution has worked elsewhere). In 'Getting to Yes'[16], the authors explain the importance of not 'thinking that 'solving their problem is their problem'". If you are able, you should try and come up with a solution. This may mean that you have to try to identify an agency or organisation that is able to provide the support required. This approach is of particular relevance in cases such as transition (into adulthood) planning. Here you may need to take on the role of project manager – to identify the possible providers of support etc and then 'sell' this solution to the public body: in marketing terms this is known as 'solution-based selling'.

There will be many problems that you are unable to solve, even with the help of social media networks/local support groups. Problems like finding suitable local supported living accommodation or specially trained care staff or the public body recruiting more therapists.

In such cases our preliminary research suggests that recasting this 'substantive problem' as a 'process' solution may work. In ordinary language, this means accepting that it is a difficult problem and asking yourself "what would a reasonable public body do in such a situation?" The answer will generally be that it would pull its finger out and prepare a plan of action – with deadlines for each stage – so that within a reasonable period of time the problem will be sorted.

Precedent letter number 7 at page 32 can be adapted for such cases.

The answer to all difficult problems is not that the family must have a direct payment (i.e. sort it out themselves). Direct payments can be empowering and a good way of meeting needs: they can also be disempowering.

16 Roger Fisher, William Ury and Bruce Patton, Getting to Yes (Random House 2011) p61.

6. Delay

Delay is one of the most common problems disabled people and carers encounter, and it is one of the most difficult to address. Often the problem is that the public body worker has an excessive caseload and in reality is unable to deal with all their cases properly. As a result they may try to deal with the most urgent and eventually go off sick. Often they have insufficient training and the department may make excessive use of 'agency' staff.

Delay is a devious creature: it creeps up slowly, initially unnoticed and later on becomes difficult to pin down. A promise is made in good faith that something will be done by a specified date. This is not put in writing, but you honestly believe it will happen. For one reason or another it doesn't happen, but a new timescale is given and this is also done in good faith. Someone falls ill, someone changes job and 'events' intrude and by that time, a year has passed and you are still waiting. It is then that you may wish that you had complained earlier and that you had got those early undertakings in writing.

Proposed solutions

Delay calls for a complaint – and generally it calls for an early complaint. As soon as things start to drift a complaint should be made: one that does not personalise the problem, but merely puts down a marker that the drift has to stop. See precedent letter number 1 at page 29.

As with all complaints, the letter should set out deadlines by which the public body should undertake the necessary corrective action to ensure that the needs are met as soon as possible. Complaints can, in appropriate cases, highlight the fact that the public body is profiting from its delay[17]–for example that by unreasonably delaying providing respite care (or failing to secure sufficiently skilled care assistant's etc) it has improperly avoided paying for this support and so financially benefited.

When making a complaint about delay it can help to stress the harm it is causing. As we note on page 9 children don't stop growing: children don't hang around while the public body gets itself sorted. Delay is particularly harmful for young people and its avoidance is an underpinning principle of the Children Act 1989 (section 1(2)). One useful technique is to point to the double standards of some public bodies: for example, schools often threaten parents where there has been a single 'non-attendance' by the child stating that 'even one day missed has an impact on a child'. This phrase can be used when complaining about a school or local authority's failure which has had the same effect. Complaints about delay often arise in cases that require coordination by more than one agency – for example a local authority and an NHS body. Complaints in such cases should require that an early meeting take place of representatives from both agencies – and that these representatives have 'decision-making' power. Complaints of this nature are often strengthened by involving councillors and the local MP: preferably by meeting with them and asking for their support and in any event, by copying your complaint to them.

17 The Ombudsman not infrequently recommends payments in such cases–for example in complaint no 10 013 477 against Essex County Council 14 August 2012 at para 28, she recommended that the council pay £43,000 'reflecting the cost of the services' that the disabled person/carer should have received (but did not) during a 2 year period.

7. "I don't have authority to ..."

A power vacuum exists. This problem can take several forms. For example, there is general agreement that you need something – but no-one seems to know who has the power to make it actually happen. Another scenario is that you have a condition that doesn't fit the public body's departmental design: you have, for example, high functioning Autism or Asperger syndrome or an attention deficit and/or hyperactive disorder (ADHD) and the authority's learning disability team or CAMHS (Child and Adolescent Mental Health Services) tell you that they don't deal with people with an IQ above 70 or ADHD.

At law, people who have ADHD, Autism and Asperger syndrome (high functioning or not) are classed as disabled people (see jargon buster on page 24). While a public body is able to create departments/teams that focus on specific impairment groups, they cannot decline to provide a service to those who have impairments that are outside the terms of reference of these teams.

Proposed solutions

Where a power vacuum exists – be it that no-one seems to have the power to agree a course of action or no team appears to have been allocated responsibility for you – it is generally best to write a letter of complaint and address it to the most senior person in the public body and copy this letter to the Monitoring Officer (see jargon buster on page 25) and other key players.[18] The letter asks that someone within the authority 'grasps the nettle' and in this respect is similar to the approach in 'interagency' disputes (see page 13).

The same approach works for situations where you are falling between two stools – the public body doesn't have any particular team whose terms of reference cover your condition. In this case the letter accepts that the public body is (for example) entitled to limit access to its learning disability team to people with an IQ below 70 – but that you need to know which team in the authority caters for your needs: "that's fine. I understand that you don't deal with this, but can you tell me who does?"

18 This could be your MP, and if the problem is with a local authority – the Chair of the relevant committee and if it is an NHS body – the chair of the Clinical Commissioning Group (CCG) in England or the Local Health Board (LHB) in Wales – these can be found by a Google search for the home page of the organisation and clicking on something like 'who we are' or searching 'councillors' or 'governing board'.

8. Personalities

Problems can result from a personality clash: the disabled person/carer labels the official as high handed and/or the public body labels the disabled person/carer as impossible to deal with. Working for a cash strapped public body can be stressful – sometimes as stressful as ensuring that your needs as a disabled person/carer are addressed properly. Officials working in difficult environments can develop coping mechanisms and adhering to strict rules and growing a 'thick skin' is one.

Disabled people/carers also develop coping mechanisms. They can become combative – constantly challenging and complaining – in order to secure appropriate support. Many recognise (and regret) that the system has forced them to become 'difficult'; in so doing they are describing a traumatic injury to their personality: inflicted by the very institutions created to provide them with support. 'Warrior Mothers'[19] is a description that has been used to describe parents 'fighting for understanding and support' for their disabled children. It is important for both public bodies and carers to recognise that personality clashes are inevitable in such difficult environments and indeed engendered by them.

Proposed solutions

Many guides to dispute resolution techniques emphasise the importance of 'separating the people from the problem'. In 'Getting to Yes'[20] for example, the authors consider a number of techniques, including: not blaming the other party for your problem; discussing each other's perceptions; and looking for opportunities to act inconsistently with their perceptions. Detachment is also essential and the use of a third party (friend or advocate) can help. Although it will often be useful to address letters/emails of complaint to another member of the public body (i.e. the Monitoring Officer/a senior manager), the evidence suggests that the 'tone' of such correspondence needs to be set with considerable care.

Resolving personality disputes generally requires respect and an imaginative solution that reconciles the need for 'face-saving': one that avoids 'the feeling or the appearance of backing down to the other side'.[21] That said, there is also a need for carers to develop assertiveness skills and to be able to challenge professionals who act inappropriately. A number of excellent guides exist to help on this question[22] – and on occasions it can be useful to remind public officials of the comments made by Lord Justice Munby: that 'the local authority, is the servant of those in need of its support and assistance, not their master'.[23]

19 Extract taken from B Lashewicz, J Mitchell, M Salami and S Cheuk Understanding and Addressing Voices of Adults with Disabilities within their Family Caregiving Contexts: Implications for Capacity, Decision-making and Guardianship–Legal Capacity, Decision-Making and Guardianship (Law Commission of Ontario 2014) p.4 – the reference here however is to 'Warrior-Hero Mothers'; see also Sara Ryan and Katherine Runswick Cole, 'From Advocate to Activist? Mapping the Experiences of Mothers of Children on the Autism Spectrum' in the Journal of Applied Research in Intellectual Disabilities 2009, 22, 43–53; Michelle Daly Warrior Mums and Yvonne Newbold Special Parents (Amity Books 2014).

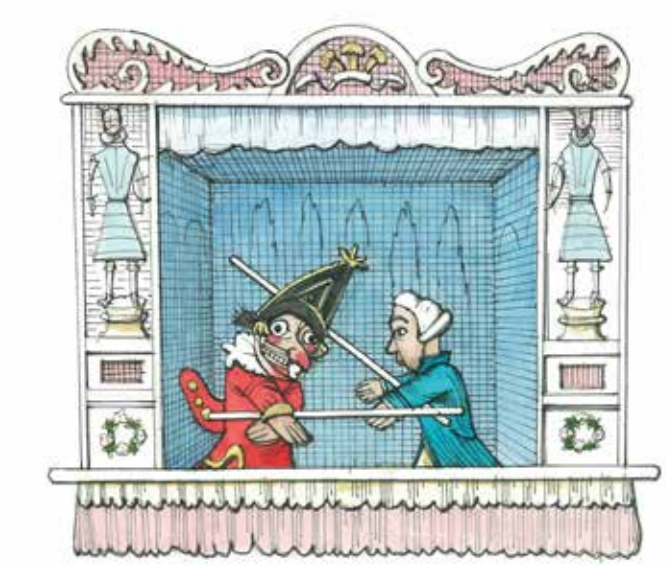
20 Roger Fisher, William Ury and Bruce Patton Getting to Yes (Random House 2011) pp 19 – 41.

21 Ibid p 31.

22 See for example Carers UK Being Heard: A self-advocacy guide for carers (2015).

23 A Local Authority v A (A Child) (2010) EWHC 978 (Fam); (2010) 13 CCLR 404, at paras 50–51.

9. Highly contested fact disputes



This type of problem often originates in a single dispute which was mishandled. The problem then snowballs, generating a considerable bundle of documents and several new and distinct complaints. This category of problem is the one our research has encountered the greatest difficulty in resolving – because they are often the most complex. At their heart there is a sense of injustice that has become difficult to define. At their most extreme they come to be part of a person's identity – and one that encompasses the idea of victimhood. The key problem may not be the outcome of a past complaint, but the manner in which it was handled and out of this sense of injustice, a multifaceted complaint develops in which there is little common ground and frequently a lack of trust and a clash of personalities.

One of the many difficulties in trying to resolve such problems is the fact that few agencies have sufficient time to go through the cardboard box full of documents, verify the facts (if possible) and come up with a solution.[24]

Proposed solutions

As this toolkit emphasises, a valuable approach involves asking the disabled person/carer "what do you want to happen as a result of this complaint?" That is generally easier to answer than trying to say what you are complaining about. However, this approach can be difficult for contested fact cases since they may be less about 'outcomes' and more about settling past injustices and forcing the public body to agree with something it might believe it has good grounds for contesting. In legal terms such cases are often about 'having one's day in court'. The idea is that the party has an opportunity to express their grievances about the way the other party has behaved and interpreted the evidence: to be heard by a respected impartial adjudicator.

This toolkit's approach does not provide for a 'day in court', although the role of the adviser/supporter can be of some help in this respect: essentially to hear the disabled person or carer and to enable them to articulate their sense of injustice. Our preliminary research suggests that progress can be made with such disputes, where there is clear agreement to limit their scope to one or two specific issues which can produce some concrete benefits in terms of providing support for the disabled person/carer. To do this, however, some past grievances will have to be put aside and the focus moved to the future: "what do you want to happen to improve the situation?"

24 That is not to say that such time and effort is not warranted. There might be very considerable cost benefits for a public body to provide for an independent arbitration process for long-standing disputes – not least where the likelihood is that it will be in close contact with the disabled person/carer for many years.

Preparing for a meeting

The more prepared you are for a meeting the more likely it is that you will make your desired vision a reality, or at least get somewhere close to it. So, before you attend a meeting make sure you are clear about who will attend and what is the meeting is about. Be specific about what you want to discuss and what you want (reducing the number of issues or tasks to only those necessary to accomplish the goal). Conduct your research beforehand – know what the authority's policy is and what your child is entitled to, and ask for any copies of paperwork/reports from professionals to support your case.

At the meeting itself, ensure that everyone introduces themselves so you know who they are, and request that someone makes notes for you so that you can concentrate on what is being said. Ask for clarification if there are any parts that you do not understand and don't be afraid of asking questions or disagreeing with someone's comments (although try to stay calm and polite- avoid being defensive). Be prepared to negotiate and compromise, and do consider the possible alternatives. You may need time to consider proposals, and don't be fearful of suggesting ideas yourself. If new papers are produced ask for time to read them and if you feel you need a break from the meeting, perhaps because you are feeling emotional, request some time out or ask to reschedule. As the meeting draws to a close be sure all participants are clear on what has been agreed, any actions to be taken, as well as the standard by which success or failure will be measured, e.g. 'action one must be completed by X.' Most importantly, tell your story, and remember you are the expert on your child.

Very often it is important to have someone attend and support you – even if only by giving emotional support or to keep written notes of what is said. You should always be allowed to have someone with you as meetings can be stressful affairs. It is not only important to prepare for meetings – it is also good to let those present know that you have done this. One parent found it helpful to bring along a large ring binder filled with copies of the relevant law/policy documents and pages about your rights (each in divided sections with 'post it' tabs). This alone sends out a strong message and can change the atmosphere: that you know your rights – sometimes without having to actually open the binders during the meeting!

Jargon Buster

ABC

An acronym used by police investigators: Assume nothing (i.e. trust no-one). Believe nobody. Check everything.

Adaptations

Local authorities are under a duty to make homes more accessible and safe for disabled people. Housing departments can make grants (known as 'Disabled Facilities Grants' (DFG)) to help with these adaptations and social services have duties under the social care legislation to help too.

ADHD

Attention deficit hyperactive disorder–see 'disabled child'.

Advocate

This is someone, usually from an advocacy service, who will support you in what you want to say, who will represent your interests, helping you to secure your rights and obtain the services you need.

Assessed or 'eligible' needs

See 'eligibility criteria'.

Assessment

An 'assessment' decides whether a person is entitled to support provided by the public body. For example, disabled people and carers have a right to an assessment (separate assessments in fact) with a skilled member of social services, who must identify their 'needs' for social care support, services and equipment, etc. The assessment decides if the person is 'eligible' – see 'eligibility criteria'.

CAMHS

See 'Child and Adolescent Mental Health Services'.

Care and Support Plan

Once a disabled person or a carer has been assessed as having eligible needs the authority must meet these needs and prepare a Plan explaining how this will be done. Plans must contain 'the operational objectives with sufficient detail – including the 'how, who, what and when'.[25] If a direct payment is made, the Plan must specify precisely what need the payment is intended to meet, why this level of payment is considered appropriate, or what outcome this will result in.[26]

Carer

Someone (for example a parent, family member or friend) who provides care for a disabled person on an unpaid basis (and not as a formal 'volunteer').

Child and Adolescent Mental Health Services (CAMHS)

CAMHS are specialist NHS children and young people's mental health services. They are normally involved if the GP or social care services are unable to provide suitable support. CAMHS should work with all young people in need of specialist help because of their mental health difficulties (and cannot refuse to support certain categories of people – for example people with Autism or ADHD).

Co-production

The idea that services are delivered (and policies are developed) in a genuinely collaborative way by professionals and people using services (and others) working together 'as equals'. See however 'JBTWIU'.

25 *R (J) v Caerphilly CBC* (2005) EWHC 586 (Admin).

26 Local Government Ombudsman complaint number 13 002 982 against Birmingham City Council– March 2014.

DFG

See 'Disabled Facilities Grant'.

Diagnosis

A medical diagnosis can be crucial in enabling an illness or disorder to be treated. It is not essential however in order to trigger a duty to provide support for a disabled child. Often it can take a considerable time to obtain an accurate diagnosis even though it is obvious that the child has substantial needs. In such a situation it would be unlawful for a public body to refuse to provide care and support, simply because there had been no diagnosis.

Direct payments

Direct payments (DP) are cash payments made by social services to people who have been assessed as needing support. There is a general right to have a DP (rather than having the authority provide the service). DPs for disabled childrens' needs are usually made to their parents. The amount of a DP must be sufficient to meet the person's assessed needs. There is no upper limit on this amount and DPs can be used to employ family members (even if they live in the same house, the authority must consider this 'necessary').

Disabled Facility Grant (DFG)

A grant paid by the local authority housing department to cover the cost of adapting a home to make it accessible/safe for a disabled person. DFGs are non-means tested for disabled children and can be paid for rented as well as owner–occupied homes.

Disabled child

'Disabled child' has a broad legal definition. It includes all people under 18 who (in general terms) have either a physical or mental impairment or illness. A mental impairment includes people with learning disabilities and mental illnesses as well as people with personality disorders, high functioning autism, Asperger syndrome and Attention Deficit and/or Hyperactive Disorders (ADHD) etc.

Disproportionate

Using a sledgehammer to crack a nut.

Eligibility criteria

Local authorities must provide care and support for people whose needs are assessed as 'eligible'. In England (for adults) and in Wales for all adults and disabled children the eligibility criteria are set out in regulations.[27] In England, the eligibility criteria for disabled children/parent carers and young carers are set locally. If a local authority decides a person's needs meet the eligibility criteria then they are said to have 'assessed' or 'eligible' needs. Authorities must, in general, meet these needs – even if they claim to have a shortage of resources.

Fettering discretion

Where a public body has a power to do something (but not a 'duty') then it has a discretion – and in every case it must decide whether it will or will not exercise that discretion. It is not allowed to decide that it will never use its discretion (or that it will only ever use the discretion in a particular way). This is unlawful and referred to as 'fettering its discretion' (see pages 12 and 14).

Holistic

See 'JBTWIU'.

27 In England in the Care and Support (Eligibility Criteria) Regulations 2015 and in Wales in the Care and Support (Eligibility) (Wales) Regulations 2015 SI 1578.

IQ (Intelligence Quotient)

The measure of the ability of a person to pass an IQ test. Some public bodies consider that only people who have an IQ below 70 can have a 'learning disability'. Generally this is irrelevant since a person may be 'disabled' even if they have a high IQ (see 'disabled child').

JBTWIU

'Just because the word is used' doesn't mean it's true. Public bodies are fond of jargon – especially words that convey sincerity and purity/strength of purpose.

Maladministration

Where a public body behaves so unreasonably that an Ombudsman considers it to be unacceptable and requiring (at the very least) an apology. The Ombudsman considers that maladministration can include:[28] delay; incorrect action or failure to take any action; failure to follow procedures or the law; failure to provide information; inadequate record-keeping; failure to investigate; failure to reply; misleading or inaccurate statements; inadequate liaison; inadequate consultation; and broken promises.

Monitoring Officer

Every local authority must have a monitoring officer[29] whose job is to ensure that their authority does not act in a way that might amount to maladministration (see page 11). Generally this will be a senior lawyer. The equivalent person for NHS bodies is called the 'Accountable Officer."

NHS Continuing Healthcare

Where a person's disability or illness is so severe that their health and social care needs become the responsibility of the NHS instead of the social services authority. People with these needs are 'eligible for NHS Continuing Healthcare' funding. It does not matter where the person lives or who is providing their care (i.e. they might be living in the community and being cared for by their parents).[30]

Ombudsman

Ombudsmen investigate complaints concerning 'maladministration' that people have made against councils, the NHS or Government departments. Generally they will only become involved if you have first made a complaint to the public body directly and this has failed. If an Ombudsman finds that the public body has acted unreasonably, she/he can recommend suitable remedies including the payment of compensation.[31]

28 LGO information/complaints materials see http://www.lgo.org.uk/

29 Local Government and Housing Act 1989 section 5.

30 For an overview of NHS Continuing Healthcare Law see Lecture 3 at www.lukeclements.co.uk/lecture-series

31 In England these are the Local Government Ombudsman and the Parliamentary and Health Service Ombudsman. In Wales the Public Service Ombudsman for Wales deals with complaints concerning all public bodies.

Ordinary lives

The right to live an ordinary life – 'it should not be regarded as an exotic idea for disabled children and those close to them to aspire to a quality of life comparable to that enjoyed by others who do not live with disability'.[32]

Outcomes

Outcomes aim to identify the person's aspirations, goals and priorities and the idea is that assessments that focus on these break free from the shackles of thought processes tied to existing service models. See however 'JBTWIU'.

Panels

A group of officers who scrutinise decisions made by staff in the public body – particularly decisions that involve expenditure. See page 16.

Personal budget

In England, local authorities must provide adults in need and adult carers who are eligible for support with a 'personal budget'. This tells the person how much the authority is spending on their support services. If the 'personal budget' monies are paid over to the person – then this is known as a 'direct payment'. A personal budget must not be an 'arbitrary' figure and must be enough to meet the person's eligible needs (and so there can be no 'maximum amount' for a personal budget).

Purity of commissioning arrangements

Authorities must meet a person's needs and if there is only one way of doing this – then they must grasp that opportunity even if it conflicts with their bureaucratic systems. In a case where a council failed to do this, the Ombudsman said that the disabled person's care had been 'entirely sacrificed to maintain the purity of the council's contractual arrangements (and that this) was a classic case of the council fettering its discretion, and was maladministration'.[33]

Reassessment and reviews

Where a person is receiving care and support from a local authority or the NHS, then the care plan should be kept under review. Reviews/ reassessments should happen at least once a year. If on review the needs have increased – then the expectation is that the support will increase (and vice versa). Reviews 'must not be used as a mechanism to arbitrarily reduce the level of a person's care'.[34] If at a review the authority is proposing to reduce the support available and if this means that a carer will have to take on additional care – the Ombudsman has held that it will be 'maladministration' for such a reduction to occur without assessing the carer and explicitly clarifying (and recording) whether she/he is 'able and willing' to provide the additional care.[35]

Reasonable

Reasonable is an important word and we considered it further at page 28. Public bodies must act reasonably. They must comply with the law, do what they have said they will do, keep you informed, answer letters and emails promptly and tell you if things change (and why). If you think a public body has behaved

32 J Read, et al Disabled children and the law: research and good practice, 2nd edn, Jessica Kingsley Publishers, 2006, p17.

33 Complaint no 99/B/00799 against Essex, 29 March 2001. 38 Department of Health, Care and Support Statutory Guidance 2014 (para 13.4).

34 Department of Health, Care and Support Statutory Guidance 2014 (para 13.4).

35 Complaint no. 15 020 384 against London Borough of Bromley 7th September 2016.

unreasonably it may amount to 'maladministration'. Generally the best way of illustrating why something is unreasonable is to explain what 'a reasonable public body would have done in the situation' (see also letter 7 on page 32).

Respite care

See 'Short Breaks' support below.

Robust

See 'JBTWIU'.

Safeguarding

Safeguarding exists to protect people who need protection. It must not be used inappropriately. Social services 'must guard against being seen as prying or snooping on the families who they are there to help and support. Nothing is more destructive of the 'working together' relationship which in this kind of context, as in others, is so vitally important than a perception by family carers that the local authority is being heavy-handed or worse'.[36]

Short breaks support

Short breaks support is sometimes referred to as 'respite care' or 'replacement care'. Local authorities are under a duty to provide such support to assist family carers of disabled children 'to continue to (provide care), or to do so more effectively, by giving them breaks from caring'. This support may be by way of a sitting service, an afterschool club or holiday club or overnight care away from the home (for example in a respite care centre or specialist short breaks fostering arrangement). Local authorities must assess how much short breaks support a family needs and are then under a duty to provide this. It follows that a local authority cannot have a 'maximum' limit on how much support of this kind can be provided.

Support plan

See 'Care and Support Plan'.

Support services

The law requires that assessed needs for social care services must be met. Where there is no suitable service, then the council must demonstrate that it is taking steps to arrange such services (see page 17). Council's cannot simply say 'we don't have anything suitable, so you will either have to use a service outside our area or you will have to arrange this yourself using a personal budget'. In a 1996 case[37] the court held that authorities had to adjust provision to meet need and not the other way around.

Timely

See 'JBTWIU'.

Transformative

See 'JBTWIU'.

Transport

Local authorities are under a duty to provide transport support for some disabled children (e.g. to school or to a respite or community based service). The fact that the disabled child lives less than three miles from their school or is receiving Disability Living Allowance (DLA)/PIP mobility allowance payments cannot (on its own) be a reason for a local authority refusing to provide them with transport assistance.

36 Comments made by Lord Justice Munby in A Local Authority v A (2010) EWHC 978 (Fam) at para 98.

37 *R v Islington LBC ex p Rixon* (1997-98) 1 CCLR 119.

What must public bodies do?

Public bodies – like all of us – must obey the law. If the law says local authorities are under a duty to assess the needs of carers (which it does) then it is simply unlawful for an authority to say 'we don't do carers' assessments'. If the law says that a local authority must meet the 'eligible' needs of a disabled person regardless of how much these may cost (which it generally does) – then an authority has to do this, even if it protests that it is short of money.

Public bodies must 'act reasonably'; this is a 'principle of public law'. One of the best ways of deciding what is reasonable is to ask yourself the question: "in this particular situation what would a reasonable person do?" Reasonable people don't have magic wands – but they do try to resolve problems as sensibly and as quickly as they can; reasonable people listen to what is said and make decisions; reasonable people 'do the best that they can'. Generally that is all the court and Ombudsmen ask of public bodies.

Reasonable authorities (for example):

- **Make decisions on the basis of the relevant evidence**

  They take into account all the available evidence before making a decision and don't ignore (or refuse to consider) relevant considerations. If the evidence is 'largely one way' then reasonable authorities make decisions on this basis.

- **Disregard irrelevant factors**

  A local authority that decides not to provide support because 'its budget has been spent' will be taking into account an irrelevant factor (i.e. the state of its finances) if the law requires the need to be met regardless of resources (which it generally does).

- **Don't have 'blanket policies'**

  Authorities are allowed to develop general policies for the way certain situations are handled, but these policies cannot be fixed – there must always be discretion to depart from them. So an authority can say (for example) that in general it will make direct payments at a rate of £13.00 per hour for personal care assistance. However if this is shown to be an inadequate rate in a particular case, it must be prepared to increase the amount. If it refused – saying that this was the maximum – then this would be unlawful. Lawyers refer to this as 'fettering a discretion'.

- **Give reasons for their decisions**

  Authorities should give reasons for decisions which have significant consequences – especially if there is competing evidence. In such cases the reasons need not 'be elaborate … but they should be sufficient to enable a person to understand in broad terms why the decision was reached.'[38]

- **Act without delay**

  Public bodies must act without delay. What amounts to 'unreasonable delay' will depend on how urgent the need is and the harm that delay may cause. Often it is not difficult to identify unreasonable delay, particularly when the public body has missed its own deadline. In some cases the law/guidance lays down specific timescales (for example in England assessments of disabled children should be completed within 45 working days – and the English Ombudsman expects that assessments of adults' needs should take no longer than 6 weeks).

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

Precedent letters

The letters that follow can also be downloaded from our website where there is a small library of 'template' letters (https://cerebra.org.uk/get-advice-support/legal-and-financial/template-letters/). Several of these have English law or Welsh law versions.

They include, for example, letters: requesting an assessment of the families' needs; complaining about a failure to finalise a 'needs assessment'; challenging a decision to reduce the support provided to a family; making a freedom of information request; etc.

Letter 1

Formal complaint [39]

*Please change or delete the **purple** text as appropriate.*

(Your name)
(Address)
(Tel)
(E-mail)

(Date)

Complaints Officer
(Address)

Dear Complaints Officer

My son/daughter: (name)
Date of birth: (e.g. 12th March 2007)
Formal complaint

I ask that you treat this letter as a formal complaint concerning the discharge by your (authority/trust) of its functions in respect of (myself) (my son/daughter). I require the complaint to be investigated at the earliest opportunity. Although I am making a formal complaint I do not want it to interfere with the good working relationship I have with (name of person in authority/trust) or to in any way delay or interfere with the support arrangements provided to (me/my son/daughter).

My complaint is:
(here set out as precisely as possible:

(a) what it is that is being complained about

(b) the names of the key staff who the complaints investigator will need to speak to;

(c) the dates of the relevant acts/omissions;

If possible also enclose copies of any relevant papers)

What I want to achieve by making this complaint is (here set out as precisely as possible what you want to be the result of your complaint: i.e. an apology, a changed service provision, an alteration to practice, interim support arrangements (and if so – timescales for this), compensation, etc.)

I understand that you will wish to contact me in order to investigate this complaint. I suggest that this be done by (here give telephone/email contact details and the time/days you are normally available etc.).

39 This letter can be found at https://cerebra.org.uk/download/complain-about-a-council-health-body/

I also understand that in investigating this complaint you may need to share information with other relevant parties/agencies and also to access my records. I confirm that I am in agreement to you taking this action – so far as it is strictly necessary.

Yours faithfully

Letter 2

Complaint about an inter-agency dispute[40]

Letter has same general format as the precedent complaint letter 1 but with the following paragraphs and is sent to both agencies (see page 13):

I ask that you treat this letter as a formal complaint concerning the discharge by your **(authority/trust)** of its functions in respect of **(myself) (my son/daughter)**. I require the complaint to be investigated at the earliest opportunity. Although I am making a formal complaint I do not want it to interfere with the good working relationship I have with **(name of person in authority/trust)** or to in any way delay or interfere with the support arrangements provided to **(me/my son/daughter)**.

It appears to me that **(I am) (my son/daughter is)** not receiving the relevant support/services/assessment, purely because there is a disagreement between your authority and **(name of other authority/trust)** as to which of you is responsible; essentially that **(I am) (my son/daughter is)** 'piggy in the middle' and that **(my)(my son's) (my daughter's)** needs are suffering because of your inter-agency dispute.

Such behaviour is unacceptable, and I understand that it constitutes maladministration and a breach of public law. I understand that in such cases the courts and Ombudsman require that either you or **(name of other authority)** grasps the nettle and ensures **(my) (my son's) (my daughter's)** needs are met – before then entering into negotiations as to which of you is ultimately responsible[41].

What I want to achieve by making this complaint is **(here set out as precisely as possible what you want to be the result of your complaint: i.e. a changed service provision, support arrangements, etc.)**

I understand that you will wish to contact me in order to investigate this complaint. I suggest that this be done by **(here give telephone/email contact details and the time/days you are normally available etc.)**.

I also understand that in investigating this complaint you may need to share information with other relevant parties/agencies and also to access my records. I confirm that I am in agreement to you taking this action – so far as it is strictly necessary.

40 This template letter is also at https://cerebra.org.uk/download/council-and-or-health-officials-are-arguing-about-whos-responsible-for-helping-us/

41 Complaint no 96/C/3868 against Calderdale MBC 24 November 1998 para 30.

Letter 3

Can I have that in writing – when things are said (or not said)[42]

Letter has same general format as precedent letter 1 but with the following paragraphs:

I refer to my previous correspondence with your authority concerning the care and support needs of (child's name) and of my needs as a parent carer (and the needs of) (names of any other person e.g. your other children or partner).

I am troubled by something that was said today, and seek your urgent clarification on this question.

At (time/date/place) I was informed by (name of person) who is I believe a (give the person's job title) in your (authority/trust) that (here include statement).

It may be that I misheard what (name of person) said – and it is for this reason that I am seeking urgent clarification of this issue. If it is indeed the policy of your (authority/trust) that (here repeat what was said), then I understand that this constitutes maladministration and indeed a breach of public law.

I ask for urgent clarification on this question. If, however, I have not received a response in writing by close of business on (date), I will have no option but to assume that this is indeed the policy of your (authority/trust) and so seek the appropriate remedy.

Letter 4

Fettering of discretion letter ~ key paragraphs[43]

Letter has same general format as precedent letter 1 but with the following:

It would appear that your authority has therefore adopted a fixed policy of not (here explain what the blanket policy is). I understand that such a policy amounts to a 'fettering of your discretion' in relation to this question and is therefore unlawful.

I ask for urgent clarification on this question. If, however, I have not received a response in writing by close of business on (date) I will have no option but to assume that this is indeed the policy of your authority and so seek the appropriate remedy.

Letter 5

Failure to answer first letter[44]

Letter has same general format as precedent letter 1 but with the following:

I refer to my previous email/letter of the (date) a copy of which I enclose.

I have not received a response to this email/letter. If I fail to have a response from you by (date) I will have no option but to make a formal complaint to your authority and to your monitoring officer (to whom I am copying this letter/email). I ask therefore that I receive a reasoned response to my earlier letter/email of the (date) by the (date).

---

42 This template letter is also at https://www.cerebra.org.uk/help-and-information/legal-help/precedent-letters/england/we-want-something-confirmed-in-writing/

43 This template letter is also at https://www.cerebra.org.uk/help-and-information/legal-help/precedent-letters/england/the-council-has-adopted-a-fixed-policy-and-says-we-dont-cant-do-that/

44 This template letter is also at https://www.cerebra.org.uk/help-and-information/legal-help/precedent-letters/england/we-havent-had-an-answer-to-our-first-letter/

Letter 6

Lack of resources[45]

Letter has same general format as precedent letter 1 but with the following:

I refer to my previous correspondence with your **(authority/trust)** concerning the care and support needs of **(child's name)** and of my needs as a parent carer **(and the needs of) (names of any other person e.g. your other children or partner)**.

On the **(time/date/place)** I was informed by **(name of person)** that your **(authority/trust)** would not provide the necessary support to meet **(my/my son/daughter's)** need for care because of your **(authority's/trust's)** 'resource shortages'.

I understand that the law places a statutory duty on your **(authority/trust)** to provide support to meet eligible needs – and that this is what is termed a 'non-resource dependent' duty. I would be grateful if you would therefore provide me, within 7 days of the date of this letter, with an explanation in clear terms why your **(authority/trust)** is not meeting **(my/my son/daughter's)** eligible needs for **(describe here what the need is for – i.e. 'respite care'/etc)**.

Letter 7

Failure of local authority to identify suitable support arrangements[46]

Letter has same general format as precedent letter 1 but with the following paragraphs:

I refer to my previous **email/letter** of the **(date)** a copy of which I enclose.

On the **(date)** your **(authority/trust)** accepted that it was necessary to provide support to meet **(my/my son/daughter's)** needs and in particular to **(describe the support that is needed)**. Although I appreciate that there may have been difficulties in securing a service to meet this need, I am concerned about the delay that is occurring. I understand that public law requires that your **(authority/trust)** acts reasonably in such cases – and it appears to me that in this case a reasonable public body would have a clear plan of action – with deadlines for each stage.

For example, it would **(here set out what you think would be reasonable – for example:**

i) undertake an assessment and confirm the eligible needs within 3 weeks;

ii) within 2 weeks thereafter it will identify a suitable respite care arrangement – or failing something suitable:

(a) put in place a short term 'stop-gap' arrangement – that will (insert details) ; and

(b) within this period will identify a suitable more 'durable' arrangement and have this up and running within 4 weeks).

I would be grateful if you could respond by **(date)**.

45 This template letter is also at https://cerebra.org.uk/download/letter-to-challenge-a-failure-to-provide-support-because-of-a-lack-of-resources-2/

46 This template letter is also at https://cerebra.org.uk/download/letter-to-challenge-delays-in-arranging-support/

Letter 8

The public body has placed you in an 'impossible position'[47]

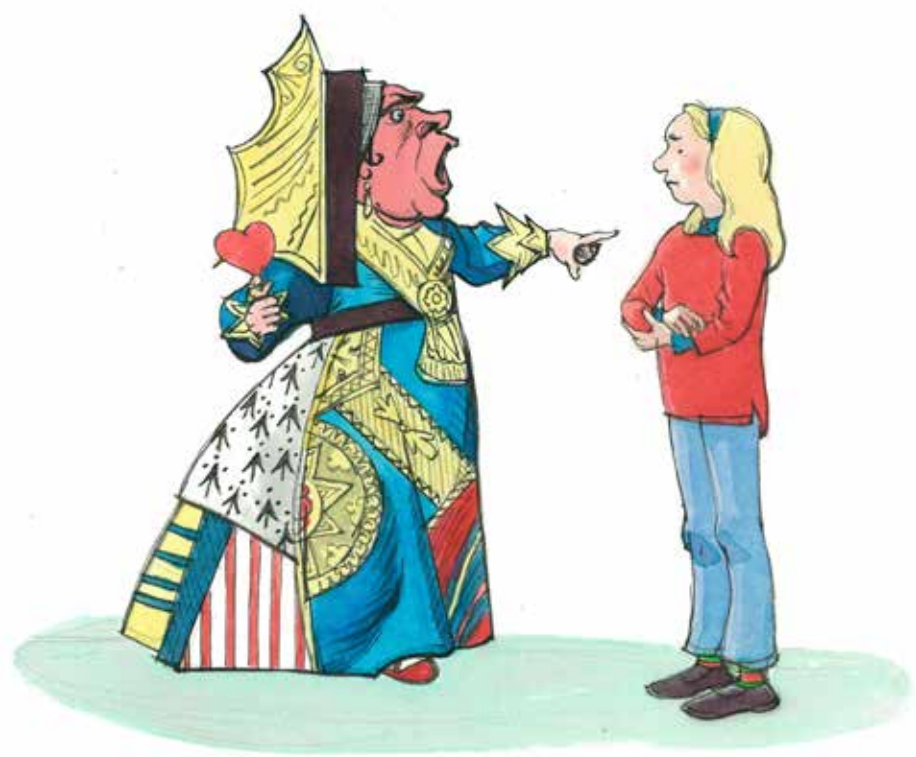
Letter has same general format as precedent letter 1 but with the following:

I refer to my previous correspondence with your authority concerning the care and support needs of (child's name) and of my needs as a parent carer (and the needs of) (names of any other person e.g. your other children or partner).

As a result of our complaint I have been told by (name of officer) that instead of providing the support that (I/my daughter/son) needs, your authority is proposing that we go back to square one and have a further assessment. (I/my daughter/son) (have/has) already been through this process and I understand that there is abundant guidance and research condemning inappropriate (and delaying) re-assessments.

Your (officer name) responded, by stating that if I did not agree to this assessment within 10 days, my refusal would be 'noted'. This action places me in an impossible position. I am concerned to have the identified support needs put in place without delay and believe that restarting the assessment cycle will inevitably lead to considerable delay (at best). However if I refuse what I believe to be an unreasonable request – this too will cause delay and my refusal will be used to suggest that I am being uncooperative and this then used as a justification for further delay.

I have no choice therefore but to agree to the assessment – but I reserve the right to refer the Ombudsman to this letter if my complaint proceeds to (her/him) for maladministration. If there is any delay in undertaking suitable assessments and any further delay in securing the identified support needs, I will have no option but to make direct contact with the Ombudsman's office for an interim intervention.



47 This template letter is also at https://cerebra.org.uk/download/letter-to-explain-that-the-councils-proposal-for-another-assessment-puts-the-parent-carer-in-an-impossible-position/

Real Snakes and Fantasy Ladders

48 Letter from public body saying a reassessment required [see p 26]	47 Everything goes well	46 Service is dreadful: complain to public body [see pages 29 & 31]	45 Private company commissioned to provide service	44 Council identify a private company to provide the support needs in the care plan	43 Your elderly father has a stroke
37 Local authority agree care plan	38	39	40 NHS and social services decide to dis-integrate: miss 2 turns	41	42 Without warning your child unexpectedly turns 18
36	35	34 Local authority and NHS disagree which is responsible– miss 2 turns [see p 13]	33	32	31 The NHS decides to reorganise its structure - miss a turn
25 Staff member on long-term sick (work related stress) miss a turn	26	27 Public body agrees to investigate your complaint	28 Staff member takes early retirement (due to re-organisation) miss a turn	29	30 You marry the leader of the Council. Advance to 47: stay there – Game Over
24	23 NHS and social services decide to integrate: miss 2 turns	22	21 Social services reorganises its structure – miss a turn	20 The panel says no [see page 16]	19 Senior officer agrees to fund package in full
13	14	15 You come up with a solution & the public body agrees to act on it [see page 17]	16	17 No response: send follow-up letter page 31	18 NO!
12 Your daughter qualifies as a barrister	11	10 No response from public body – send complaint letter page 29	9 Case referred to social worker with no caseload	8 REASSESSMENT	7
1 Buy lever arch file and note pad: enter date on note pad and file it	2 Join parent support group and make your first 'tweet'	3 Prepare letter to public body – go to www.cerebra.org.uk and search template letters.	4 Send letter to public body. Keep copy in your file.	5 Gather supporting evidence [see page 9] Evidence	6 Prepare/copy supporting evidence ready for the assessment meeting [see page 22]

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

First edition: 2016

This edition: 2024

Review date: 2027

Working wonders for children with brain conditions

Postal Address
Cerebra
The MacGregor Office Suite
Jolly Tar Lane
Carmarthen
SA31 3LW

Tel: 01267 244200
Freephone: 0800 3281159

Registered Charity no 1089812 Company no. 4336208

amrc
ASSOCIATION OF MEDICAL RESEARCH CHARITIES

Registered with FUNDRAISING REGULATOR

INVESTORS IN PEOPLE

UNIVERSITY OF LEEDS

www.cerebra.org.uk