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The *Warwickshire* judgment – implications for social care related assessments of disabled children

Case overview

This update builds on case law update 1, which summarised the whole judgment in *R (L and P) v Warwickshire County Council* [2015] EWHC 203 (Admin) ('the *Warwickshire* judgment').

The purpose of this update is to consider in more detail the implications of the *Warwickshire* judgment on 'Ground C'. This concerned whether Warwickshire's consultation on changes to social care services was unlawful because its proposed policy restricted access to social work assessments only to those disabled children with more complex needs.

The Council for Disabled Children (CDC) considers that it is likely that issues in relation to social care assessments for disabled children will be considered by the High Court again in the near future. If there is any difference in the approach taken in future judgments to that taken in the *Warwickshire* judgment, we will cover this in a further case law update. As the obligations to assess disabled children are set out in statutory guidance we will also produce another update if the guidance changes or new guidance is issued.

Decision

The Judge (Mr Justice Mostyn) dismissed the claim against Warwickshire in relation to Ground C. Permission to appeal to the Court of Appeal on this issue has now been finally refused. As such the judgment of Mr Justice Mostyn reflects the current state of the law.

Ground C was discussed in the judgment at paragraphs 61-73. At paragraph 68, the Judge set out the relevant extract from Warwickshire's policy:

"A Common Assessment Framework (CAF) assessment can be initiated by any professional who has attended the Warwickshire CAF training. This will enable the needs of the child or young person and their family to be identified and the best services to be co-ordinated to meet their needs. The Lead Professional will organise a CAF Family Support meeting with the parent(s) young people and relevant services to coordinate the CAF Family Support Plan.

Professionals can consult with a children's Social Worker in the Local Authority if they are unsure whether a Social Work Assessment is necessary.

...

Children in need may be assessed through a CAF Assessment or through other assessments in relation to the care they are receiving, their special educational needs, disabilities, or as a carer, because they have committed a crime, for children and young people whose parents are in prison and for asylum seeking young people.

...

Where a child or young person or their family has very complex needs or the CAF Family Support Plan has not resulted in the desired improvement outcomes for the child or young person, an assessment by a Local Authority Social Care may be appropriate”

The lawyers acting for the children challenged this on the basis that ‘any child who is or may be a child in need’ is entitled to a social care assessment under the relevant statutory guidance (*Working Together to Safeguard Children*)’ (judgment at paragraph 61).¹

The Judge’s conclusions on Ground C are at paragraphs 71-72 and are set out below:

‘In my judgment this ground is wholly meritless and unarguable. It would not make sense for any child with any “mental disorder” to be entitled automatically to receive a section 17 assessment conducted by a social worker given the mutability of the term mental disorder. I agree with Mr Goudie QC² that it may, for example, be entirely inappropriate for a child with dyslexia or dyspraxia to receive a social care assessment under section 17.

In my judgment the guidance should not be read as insisting that every disabled child should initially be the subject of a full-blown social worker assessment. Alternatively, if it does say that then local authorities and safeguarding boards would have good reason for departing therefrom. The approach taken in the threshold document strikes me as eminently reasonable in terms of initial deployment of resources.’

CDC considers that in the light of the *Warwickshire* judgment, the legal position on social care related assessments for disabled children is as follows:

1. All ‘disabled’ children are children ‘in need’; see section 17(10)(c) and (11) of the Children Act 1989.³

¹ See also judgment at paragraph 70; ‘It is said that the threshold document is unlawful inasmuch as it is suggests that a disabled child can be assessed under the CAF by a professional who is not a social worker.’

² The barrister representing Warwickshire.

³ Section 17(11) states a child is ‘disabled’ if ‘he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity...’. In the *Warwickshire* judgment, Mr Justice Mostyn stated at paragraph 64 that ‘a disabled child, irrespective of the scale of his disability, is to be taken, without any qualification or value judgment, to be “in need”’.

2. All children 'in need' are entitled to some form of assessment; see *R (G) v Barnet LBC* [2003] UKHL 57.⁴
3. However there are no statutory duties as to the form of the assessment under section 17 of the Children Act 1989 or who should carry it out. This is in contrast to the position for assessments of disabled adults, where there are detailed statutory duties on these issues under the Care Act 2014.⁵
4. Following the *Warwickshire* judgment, local authorities are permitted to decide that some 'disabled' children with lesser needs will be assessed at least at first under the Common Assessment Framework – for example through an 'Early Help' assessment.
5. Disabled children with more complex needs should be assessed by social workers. It is up to each local authority to decide where to 'draw the line' as to when a child's needs means that the assessment should be carried out by a social worker.
6. However disabled children are assessed, it is vital that assessments are done in a 'joined up' way – for example an 'Early Help' or social worker assessment could be completed as part of the Education, Health and Care needs assessment process, or a parent carers needs assessment (see below) could be combined with the assessment of the disabled child if everyone agrees.⁶

After the *Warwickshire* judgment was handed down, the Department for Education published the latest edition of the *Working Together to Safeguard Children* statutory guidance (March 2015). There is a legal duty on local authorities to follow this guidance unless there is a 'considered decision that there is good reason to deviate from it'.⁷ As can be seen above, if the previous version of *Working Together* was to be read as saying that all disabled children should be assessed by a social worker, the Judge held that Warwickshire had good reason for departing from it. However whether a local authority is permitted to depart from the *Working Together* guidance is something the court will decide on the facts of each case, if a challenge is made on the basis of a failure to follow the guidance.

Working Together (March 2015) contains the following key guidance in this area (all from pp18-19):

1. 'Children in need may be assessed under section 17 of the Children Act 1989, in relation to their special educational needs, disabilities, as a carer, or because they have committed a crime. Where an assessment takes place, it will be carried out by a social worker.'

⁴ The House of Lords in *R (G) v Barnet LBC* relied on paragraph 1 of schedule 2 to the Children Act 1989 to identify a duty to assess children 'in need'. In *R (J) v Worcestershire CC* [2014] EWCA Civ 1518, the Court of Appeal recently held at paragraph 13 that 'a duty to assess...is triggered by the physical presence of a child in need in a local authority's area. No more is needed'. See also paragraph 18; 'A local authority has a duty to assess a child in need who is physically present in their area...'

⁵ See section 9 of the Care Act 2014 and the Care and Support Assessment Regulations 2014. These are explained in chapter 6 of the Care and Support Statutory Guidance.

⁶ See paragraph 3 of schedule 2 to the Children Act 1989 for one of many legal powers for local authorities to combine assessments.

⁷ See *R (TG) v Lambeth LBC* [2011] EWCA Civ 526 at paragraph 17.

2. 'When undertaking an assessment of a disabled child, the local authority must also consider whether it is necessary to provide support under section 2 of the Chronically Sick and Disabled Persons Act (CSDPA) 1970. Where a local authority is satisfied that the identified services and assistance can be provided under section 2 of the CSDPA, and it is necessary in order to meet a disabled child's needs, it must arrange to provide that support.'
3. 'If a local authority considers that a parent carer of a disabled child...may have support needs, they must carry out an assessment under section 17ZD [a parent carers' needs assessment]. The local authority must also carry out such an assessment if a parent carer requests one. Such an assessment must consider whether it is appropriate for the parent carer to provide, or continue to provide, care for the disabled child, in light of the parent carer's needs and wishes.'

What this means for children, young people and families

It is clear from the *Warwickshire* judgment that not every disabled child is entitled to be assessed by a social worker. However the *Warwickshire* judgment does not and cannot change the earlier decision of the House of Lords⁸ that every child 'in need' is entitled to some form of assessment.

Before asking for an assessment parents and disabled children may want to see what support is available locally without an assessment. This information should be clearly available through the 'local offer'. If it is not, it is likely that an assessment will be required to access any support.⁹

Parents and disabled children who may want additional support can ask their local authority to explain which children will receive an assessment by a social worker and which children will be assessed under the Common Assessment Framework, for example through an 'Early Help' assessment. Again, this information should be clearly available as part of the 'local offer'.¹⁰

Working Together (2015) says that there should be a 'threshold document' for every local authority dealing with different kinds of assessment (p15, para 18). Again, this 'threshold document' should be available as part of the 'local offer' – but if it isn't, parents may want to ask for a copy.

Parents may also want to ask for a 'parent carers' needs assessment'¹¹ which should be done at the same time as the assessment of the disabled child – and can be combined into a single assessment document if everyone agrees. This assessment should look at the needs of parent carers for additional support in their caring role.

Whatever form of assessment is used and whoever carries it out, what matters most is that the needs of disabled children and their families are properly understood so

⁸ In *R (G) v Barnet LBC* [2003] UKHL 57.

⁹ Social care information has to form part of every 'local offer'; see paragraph 13 of schedule 2 to the SEN and Disability Regulations 2014.

¹⁰ Eligibility criteria have to form part of every 'local offer'; see paragraph 18 of schedule 2 to the SEN and Disability Regulations 2014.

¹¹ Under sections 17ZB-ZD of the Children Act 1989, inserted by section 97 of the Children and Families Act 2014.

that informed decisions can be made about the level of support they need from their local authority.

Social care assessments of disabled young people aged over 18 are carried out under the Care Act 2014 and so are not affected by the *Warwickshire* judgment. The Care Act 2014 also requires assessments to be completed of disabled children and family carers as they move towards adulthood. These ‘transition assessments’ are covered in chapter 16 of the Care and Support Statutory Guidance.

Implications for local authorities

In the light of the *Warwickshire* judgment, each local authority will have to decide where it wants to ‘draw the line’ for disabled children to be able to access an assessment by a social worker, rather than simply an ‘Early Help’ assessment or other assessment under the Common Assessment Framework. Local authorities will note that the examples given by Mr Justice Mostyn of children for whom a ‘full-blown’ social worker assessment may not be appropriate were children with dyslexia or dyspraxia.

Local authorities should also note the finding by the Judge that restricting access to social worker assessments is ‘eminently reasonable in terms of initial deployment of resources’ (our emphasis). This suggests that it must be possible for a child who has had an ‘Early Help’ assessment to access a social worker assessment if their needs are still not being met appropriately or in full.¹²

Local authorities will need to have regard to their duties under the Equality Act 2010 in deciding where to ‘draw the line’ between different types of assessment. It may be that treating different groups of disabled children differently, for example because of their medical diagnosis, gives rise to unlawful discrimination under the 2010 Act.¹³ This issue was not considered in the *Warwickshire* judgment.

In reaching this decision, the local authority will also need to consider carefully the guidance in *Working Together* (2015). In particular:

1. The 2015 guidance seems to strengthen the obligation to ensure that assessments are carried out by social workers. Does the local authority accept that this is what the guidance says? If so, does the local authority have good reason to depart from it?
2. The guidance states that when assessing a disabled child the local authority ‘must also consider whether it is necessary to provide support under [the CSDPA 1970]’.¹⁴ Does the way the local authority uses ‘Early Help’ assessments allow it to reach the decision required under the CSDPA 1970,

¹² This was recognised in the extract from Warwickshire’s policy cited above.

¹³ And potentially also Article 14 ECHR, the right to non-discrimination in the enjoyment of all human rights. Social care services are part of the way in which the state shows respect for the family and private lives of disabled children and their families, as required by Article 8 ECHR. Under Article 14 these rights must be enjoyed without discrimination – meaning that any differences in treatment of different groups need careful justification.

¹⁴ This reflects the fact that the duty under the CSDPA 1970 is discharged by the local authority exercising functions under Part 3 of the Children Act 1989, particularly section 17; see section 2(4) of the CSDPA 1970.

being whether it is necessary to meet the needs of the child to provide any of the services listed in section 2(6)?¹⁵

3. Is there a joined up process so that 'Early Help' assessments can be carried out alongside parent carer needs assessments – or indeed to carry out both as one single assessment if everyone agrees?

In CDC's view it may not be possible or appropriate for an 'Early Help' assessment to inform the decision as to whether services must be provided to the child under the CSDPA 1970. If this is right, then in cases where a disabled child may meet any local eligibility criteria for CSDPA services it will be necessary for a 'full' assessment to be carried out by a social worker in accordance with the guidance on assessments in *Working Together* (2015).

Equally local authorities will need to consider whether it is appropriate to carry out an 'Early Help' assessment rather than a 'full' social worker assessment where a parent carers' needs assessment is requested or required.¹⁶ The point of a parent carers' needs assessment is to inform the decision as to what services to provide to the child and family under section 17 of the Children Act 1989.¹⁷

CDC would suggest that whatever form an assessment takes, what matters is that it allows the local authority to answer two key questions:

1. What are the child's needs, in their family context?
2. Which needs is it necessary for the local authority to meet, taking account of their duties to safeguard and promote the child's welfare?

Where there are child protection concerns, local authorities will need immediately to refer the case to the relevant social work team in accordance with section 47 of the Children Act 1989 and *Working Together* (2015).

Local authorities will need to ensure that cases where children may have complex health needs are referred to the Clinical Commissioning Group for a 'continuing care' assessment.¹⁸

Local authorities who choose to rely on 'Early Help' assessments for some disabled children will need to ensure that the assessors have the necessary skills, qualification and experience to understand the needs of these children and their families and recommend appropriate provision.

Each local authority should have a transparent and public policy on assessment for disabled children set out in the threshold document issued by the Safeguarding Children's Board for which it is a member; see *Working Together to Safeguard Children* (2015) at p15, para 18.

¹⁵ The service list in section 2(6) is very broad and includes (amongst other things) all forms of short breaks other than residential short breaks, domiciliary care, adaptations to the home, transport to social care activities, assistance with accessing education and holidays.

¹⁶ Parent carer needs assessments must be carried out either on request or simply because 'it appears to the authority that the parent carer may have needs for support'; section 17ZD(3) of the Children Act 1989.

¹⁷ See section 17ZF of the Children Act 1989.

¹⁸ Department of Health, *National Framework for Children and Young People's Continuing Care*, 2010 (revised version forthcoming).

Finally, local authorities who want to reduce the demand for social care assessments may wish to consider increasing the level of 'non-assessed' services available via their 'local offer'.