

Chapter 3

Children's services

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Introduction

- 3.1 Disabled children are children first, and as such should be able to access all the services available to all children. These should include nurseries, playgroups, playgrounds, leisure services, children's centres and mainstream schools. The duties on service-providers to make mainstream and universal services accessible to disabled children are discussed in chapter 9 (equality and non-discrimination). There are also now specific obligations to ensure a sufficient supply of certain services for disabled children, for instance childcare; under the Childcare Act 2006 s6(5),¹ the duty on local authorities to secure sufficient childcare for working parents applies in relation to disabled children up to the age of 18. Duties towards carers and young carers are dealt with in chapter 8.
- 3.2 This chapter is concerned with the provision of additional services to disabled children by children's services authorities (in Wales still referred to as social services authorities, and sometimes given slightly different names in England, for instance 'Children and Learning -Directorate' or similar). It sets out the duties to assess the needs of disabled children and discusses the complex issue of when the authority has a duty to provide services to meet the child's assessed needs. It also deals with duties on authorities to accommodate disabled children and the additional rights which should be enjoyed by disabled children who are 'looked after' as a result of being accommodated or who are 'leaving care'. Disabled children's rights to health services, including NHS continuing care, are considered in chapter 5.
- 3.3 This chapter, like all those that follow, should be read with the realities described in chapter 1 in mind. As we have noted (see paras 1.43 – 1.44 above), for many families the social care system is one of baffling complexity and dealing with it amounts to additional, tiring and frustrating work. Not infrequently the system requires parents to attend multiple meetings where they repeat the same information to a range of unfamiliar specialists in different settings. As we noted, in one case a family of a one-year-old child attended (over a nine-month period)

315 service-based appointments in 12 different locations (see para 1.56).

Statutory scheme: disabled children as ‘children in need’

- 3.4 The key legislation governing the provision of additional services to disabled children is the Children Act (CA) 1989 (in particular Part III, ‘Local authority support for children and families’) and the Chronically Sick and Disabled Persons Act (CSDPA) 1970. The Chronically Sick and Disabled Persons Act 1970 establishes the duty to provide most of the services which disabled children will need. The Children Act 1989 establishes the assessment duty and also requires the provision of certain specific services, particularly residential and foster care short breaks. Assessments made under CA 1989 should also determine whether a child is eligible for support under CSDPA 1970.²
- 3.5 The Children Act 1989 s17(1) creates a general duty on children’s services authorities to safeguard and promote the welfare of children within their area who are ‘in need’. So far as is consistent with this duty, children’s services authorities must promote the upbringing of such children by their families.³ Children’s services authorities are empowered to provide ‘a range and level of services’ to meet the needs of ‘children in need’. The work of authorities under CA 1989 Part III should be directed at (among other things) avoiding the need for care proceedings under CA 1989 Part IV by providing effective family support.⁴
- 3.6 The definition of ‘children in need’ is to be found at CA 1989 s17(10), which provides that a child is to be taken as ‘in need’ if:
- (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority . . .; or
 - (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
 - (c) he is disabled.
- 3.7 At subsection (11) the definition of ‘disabled’ for the purposes of CA 1989 Part III is given as follows:
- For the purposes of this Part, 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 or such other disability as may be prescribed.
- 3.8 This definition is closely related to the definition of a disabled adult in the National Assistance Act 1948 s29. It is outdated and excessively medical in its approach; however, it has the practical advantage of being extremely broad. In particular, the phrase ‘mental disorder of any kind’ encompasses a wide range

of conditions, including Asperger syndrome/high-functioning autism, attention deficit hyperactivity disorder (ADHD) and attention deficit disorder (ADD) as well as impairments such as learning disability, mental illness and personality disorder. All such conditions fall within the Mental Health Act 1983 s1(2), which defines 'mental disorder' as including 'any disorder or disability of mind'. Additionally, a mental disorder will generally amount to a disability within the definition in the Equality Act 2000 s6,⁵ and accordingly any difference in treatment of such persons will be liable to challenge as unlawful disability discrimination – see, for example, *Governing Body of X School v SP and others*.⁶

- 3.9 In the absence of any confirmed diagnosis, a child may still be a 'child in need' by virtue of requiring services for the reasons specified in section 17(10)(a) or (b). Moreover, any insistence on a medical diagnosis by a children's services authority before a child is deemed to be 'disabled' within section 17(10)(c) might be considered anomalous given the professed universal social work commitment to the 'social model' of disability (see paras 1.5 – 1.7). In any event, there is a low threshold for social care assessments,⁷ which should be carried out if a child may be 'in need' (one of the potential outcomes of the assessment being a decision that he or she is not in fact 'in need').

Social work service/key workers

- 3.10 Although the policy guidance⁸ (see para 3.14) expects that social workers will take the lead in assessing children in need, this is not a statutory requirement and a child's needs must be assessed even if the child (or the child's family) has no social worker assigned to them. Local authorities must, however, ensure that they 'secure the provision of adequate staff'⁹ to discharge these various roles and where harm results from delay caused by staff shortages, it will constitute maladministration.¹⁰
- 3.11 Given the difficulties that parents and children have in obtaining information and accessing fragmented and uncoordinated services, it is little wonder that many families value the allocation of a particular worker to them and refer to the positive impact that a -capable and conscientious key worker can have on their lives.¹¹ Models of -service and the recommended roles for key workers vary, but central key worker tasks include being the single point of contact for the family, the key source of information and guidance, the mediator and facilitator with other professionals across agency boundaries and the co-ordinator of provision, as well as acting as an advocate and source of personal support. An individual in this position is well-placed not only to provide essential information but also to act as a guide through complex service structures, to take the strain of negotiation from the parents and to help them to access services. Key workers can be effective in relieving the stress often experienced by parents. While the first official recommendation that children and their families should have a single professional to act as their main point of contact was made in 1976,¹² research over subsequent decades has highlighted how patchy developments have been in this respect.¹³ The government in England has long professed a commitment to key workers and has issued a range of guidance documents on the role of the 'lead professional'.¹⁴

3.12 In the following paragraphs, we detail the legal duties of local authorities in relation to assessment. There are, however, some very basic principles which should underpin all assessments of disabled children and their families.¹⁵ Assessments should be needs-led rather than dictated by available provision. In consultation with all the children and adults concerned, the assessment process should identify first, the barriers that inhibit the child and family living an ordinary life and second, what can be done by the support agencies to tackle them.¹⁶ Assessment should take account of the needs of the whole family and individuals within it; while some services may be provided directly to a disabled child, others may be offered to parents or siblings (see chapter 8 for duties to adult and child carers). The agreed provision or arrangements following assessment may not necessarily take the form of what are usually seen as social care services.¹⁷ There has also been a growing emphasis on assessment practice that adopts an outcome focus. This means that the practitioner undertaking the assessment, together with the children and adults in the family, identifies a range of outcomes that are important to help the family to live a more ordinary life. All involved then agree on the provision that could make those outcomes happen.¹⁸ The effectiveness of any intervention is then judged on the extent to which the identified outcomes are achieved. Assessments should be undertaken and provision put in place promptly and children and their families should not have to wait for essential services. Early intervention is regarded as important in order to avoid families reaching crisis point.¹⁹ Finally, because children grow and develop and family circumstances change, assessment of need should not be seen as a one-off event but should be repeated as required, while avoiding the burden that unnecessary repetitious assessments impose on families.

Duty to assess

3.13 Although CA 1989 contains no explicit duty on children's services authorities to assess the needs of disabled children and their families,²⁰ the House of Lords in *R (G) v Barnet LBC and others*²¹ held that such a specific obligation to assess under CA 1989²² did exist.

3.14 Any doubt as to whether there is a duty to assess the needs of children who are or may be 'in need' is resolved by the relevant statutory guidance, Framework for the assessment of children in need and their families ('the Assessment Framework')²³ which requires children's services authorities to undertake assessments adopting a child- and family-centred approach. The Assessment Framework is statutory guidance (see paras 2.24 – 2.27) issued under Local Authority Social Services Act (LASSA) 1970 s7 and as such children's services departments are bound to follow it unless there is good reason not to do so.²⁴ It is over 100 pages in length and has annexed to it model care plans which themselves occupy 40 pages. The Assessment Framework is the product of considerable research and seeks to ensure that social workers when undertaking an assessment address all aspects of the child's life. Its purpose is therefore to ensure that provision for children in need is not arbitrary or

left to chance.

3.15 The Assessment Framework sets out mandatory requirements of the assessment process, including the following:

- A decision as to whether to assess should be made within one working day of a referral being received. A referral is defined as a -request for services to be provided by the children's services/-social services department, and may be made by the family, a professional or indeed anyone involved in or concerned about the care of a disabled child. A decision following a referral may be to take no action, but this remains a decision and should be recorded as such. All decisions should be communicated, with reasons, to the referrer, the parents or caregiver and the child, if appropriate (Assessment Framework, para 3.8).
- If there is a need to gather more information, an initial assessment must be completed within a maximum of seven working days. An initial assessment can be brief if the child's circumstances allow, but must address all the 'dimensions' set out in the Assessment Framework (see para 3.16 below). It should determine whether the child is 'in need', the nature of any services required, who will provide these services and within what timescales. It should also state whether a further, more detailed core assessment should be undertaken. As part of any initial assessment, the child should be seen (Assessment Framework, paras 3.9 – 3.10).
- A core assessment is an in-depth assessment which 'addresses the central or most important aspects of the needs of a child'. Although led by children's services, it will invariably involve other agencies (in the case of a disabled child, most often the Primary Care Trust, or in Wales the Health Board). The conclusion of a core assessment should involve analysis of the findings to inform planning, case objectives and service provision. The entire process should be completed within a maximum of 35 working days (from the date the initial assessment ended). Appropriate services should be provided while awaiting the completion of the core assessment (Assessment Framework, para 3.11).
- At the conclusion of the assessment the child or the parent should be asked to record their views and comment on the assessment (Assessment Framework, para 3.13).
- Direct work with the child is 'an essential part of assessment'. Assessments of disabled children may therefore require more preparation, more time and potentially specialist expertise in communication (Assessment Framework, para 3.41).²⁵ This obligation to engage with the child in the assessment process is reinforced by CA 1989 s17(4A),²⁶ which requires an authority to ascertain and give due consideration to a child's wishes and feelings before deciding what (if any) services to provide to that child. The High Court has stressed that even if a disabled person was felt to be 'completely' prevented from communicating their wishes and feelings, the assessors had a duty to ascertain those wishes and feelings by any possible means.²⁷ See paras 1.21 – 1.24 for more on the fundamental duty to consult with disabled children on decisions about their lives.

- 3.16 Both an initial assessment and a core assessment must cover the three 'domains' and 20 'dimensions' set out in the Assessment Framework. The 'domains' are (i) the child's developmental needs, (ii) parenting capacity and (iii) family and environmental factors. Important 'dimensions' within these domains for a disabled child are likely to include health, education, emotional and behavioural development and self-care skills (child's developmental needs), ensuring safety (parenting capacity) and housing, family's social integration and community resources (family and environmental factors). 'Involving disabled children in the assessment process' is also listed as a separate 'domain' under family and environmental factors, demonstrating the importance of a genuinely participatory approach to assessment.
- 3.17 The Assessment Framework is a very prescriptive document and has been criticised for seeking to 'micro-manage' the assessment process. There is an obvious danger that form may trump substance, ie that a document which has all the correct headings for the different 'dimensions' may be produced but there may still be no proper assessment of the child's needs. This is the opposite of the intention of the Assessment Framework and any such document will be unlawful. What is therefore important is not that the assessment looks like an initial or core assessment, but that it carefully and accurately sets out and evaluates all the child's needs so a proper decision can be made as to what services (if any) are required to be provided to the child and/or family to meet those needs (see paras 3.45 – 3.46 on the duty to provide services to meet assessed needs).
- 3.18 To ensure that assessments addressed the particular needs of specific groups, practice guidance²⁸ was published at the same time as the Assessment Framework. This practice guidance includes a chapter entitled 'Assessing the needs of disabled children and their families', written by practitioners and containing guidance to ensure that the Assessment Framework is used sensitively and appropriately with disabled children. The practice guidance is a widely overlooked resource and should be consulted more frequently, particularly if the Assessment Framework appears not to address the particular needs of disabled children on a specific issue.
- 3.19 As all 'disabled' children are children 'in need', then any referral of a disabled child to children's services should result in an initial assessment. The only time an initial assessment will not be required is if the family are satisfied by services being provided informally through some form of 'local offer'; but if an initial assessment is requested there is no legitimate way for an authority to avoid carrying one out if it accepts that the child is 'disabled' or otherwise 'in need' (see para 3.6).
- 3.20 The Assessment Framework is silent as to precisely when children's services authorities should move from an initial assessment to a core assessment. The presumption seems to be that if a child has needs which require the involvement of more than one agency, then a core assessment should be carried out. However, as even an initial assessment requires a consideration of the three 'domains' and 20 'dimensions' and must result in a care plan (see para 3.33), there may be little

practical difference between the outcome of these different types of assessment – other than that a core assessment should result in much more input from other agencies (eg health) than an initial assessment.

- 3.21 It is clear from reading the Assessment Framework and its accompanying practice guidance that its primary focus is on the needs of children ‘in need’ as a result of environmental factors or difficulties within their families, rather than due to disability. In practice, disabled children are the only group of children ‘in need’ where some sort of parental ‘deficit’ is not assumed. However, the Assessment Framework clearly applies to all assessments of children in need and there is no reason in practice why it cannot be made to work for disabled children, if applied sensitively by professionals who have the necessary expertise. It is also important to recognise that disabled children are vulnerable to abuse and neglect and may therefore be ‘in need’ for the same reason as other children. Indeed the prevalence of abuse against disabled children and the degree to which is recognised have given rise to concern for some time (see para 1.71).²⁹
- 3.22 The duties under the Assessment Framework have been the subject of significant litigation, which has reinforced their nature as being ‘substance’ rather than ‘form’. In *R (AB and SB) v Nottingham CC*³⁰ it was held that a failure by an authority to have in place a ‘systematic approach’ for conducting a core assessment was an ‘impermissible departure from the guidance’. The High Court held further that at the end of the assessment process ‘It should be possible to see what help and support the child and family need and which agencies might be best placed to give that help’. The High Court has also established that assessments must address foreseeable future needs as well as present needs; *R (K) v Manchester CC*.³¹
- 3.23 A failure to carry out a lawful assessment according to the Assessment Framework may result in the court requiring that a new assessment be undertaken.³² A failure to involve a disabled child in his or her assessment may also render the process unlawful, as was the case in *R (J) v Caerphilly CBC*³³ where it was held that severely challenging behaviour exhibited by a young man did not absolve the authority of its duties to engage him in the assessment.
- 3.24 Since the Assessment Framework was published, there has been an attempt by central and local government to move away from -detailed assessments of ‘children in need’ towards a more flexible approach, often using what has been termed the ‘Common Assessment Framework’ (CAF).³⁴ For younger children, the Early Support Programme and its family support plan, which also applies a simplified assessment process, have had a generally positive response.³⁵ The idea behind these developments is to streamline the assessment process so it can be used (and shared) by all professionals who have involvement with the relevant child. While such an approach has practical advantages, the fundamental legal duty towards ‘children in need’ (including disabled children) is to assess their needs in a manner consistent with the Assessment Framework. If families are happy with a less rigorous approach, this may be acceptable in -practice. However, any authority that neglects its assessment duty where a family is less than happy with the approach is likely to find itself criticised by the High Court or the Ombudsman and potentially

required by a mandatory order to conduct a lawful initial or core assessment.

Duty to provide services

3.25 There is an expectation in the law and guidance that where disabled children are assessed as having substantial needs, these needs will be met through the provision of services. However, given the longstanding gulf between need and available resources, it is important for families to know when there is a duty on a children's services authority to meet need following assessment. This section seeks to answer this unhelpfully complex question.

3.26 In relation to the general expectation that assessed needs will be met, the general duty (see para 2.30) on authorities is to provide services so as to minimise the effects of disabled children's disabilities and give them the opportunity to lead lives which are 'as normal as possible'.³⁶ Furthermore, the clear expectation of the Assessment Framework is that an initial assessment or core assessment will generally lead to the provision of services. This is demonstrated by para 4.1 (emphasis added):

The conclusion of an assessment should result in:

- an analysis of the needs of the child and the parenting capacity to respond appropriately to those needs within their family context;
- identification of whether and, if so, where intervention will be required to secure the wellbeing of the child or young person;
- a realistic plan of action (including services to be provided), detailing who has responsibility for action, a timetable and a process for review.

3.27 The duties under CA 1989 s17 and the Assessment Framework are reinforced by the general duty to safeguard and promote the welfare of all children in the authority's area under Children Act (CA) 2004 s11.³⁷ The statutory guidance³⁸ to the 2004 Act deals with the application of the duty to individual cases and describes the 'key functions of an effective system' as including that:

Following assessment, relevant services are provided to respond to the identified needs of children and to support parents/carers in effectively undertaking their parenting roles.³⁹

3.28 It is not, however, necessarily the case that services must be provided to meet every assessed need. Whether a children's services authority has to provide services following assessment is dependent upon the nature and extent of the need assessed and the consequences of not providing the service. It is also important here not to confuse the decision that a need must be met with the decision on the way to meet the need. For example, a local authority may conclude that there is a need for a child and his or her carers to have a short break from each other.

This need can be met in a variety of ways – eg by a way of a sitting service in the child’s home, by the child attending a day service or activity away from the home and so on.

Diagram 1: Assessment and service provision decision: stages and questions

Assessment

If a child presents who may be ‘in need’ (for example, they may be disabled – see para 3.7) , the local authority must undertake an assessment and identify what needs for support or services the child and/or the family have (see paras 3.13–3.15).

Following the assessment, the local authority must decide which of the various needs that have been identified it is ‘necessary’ to respond to, ie where an ‘intervention will be required’ (see para 3.26 above). This decision must then be set out in a care plan, amounting to a ‘realistic plan of action’. While what is ‘necessary’ will vary for each individual child, it is highly likely that it will be ‘necessary’ to provide a service where a failure to do so would cause significant harm to the child (and/or the family) – see para 3.43. ‘Significant harm’ means harm that is more than minor or trivial.

Service provision

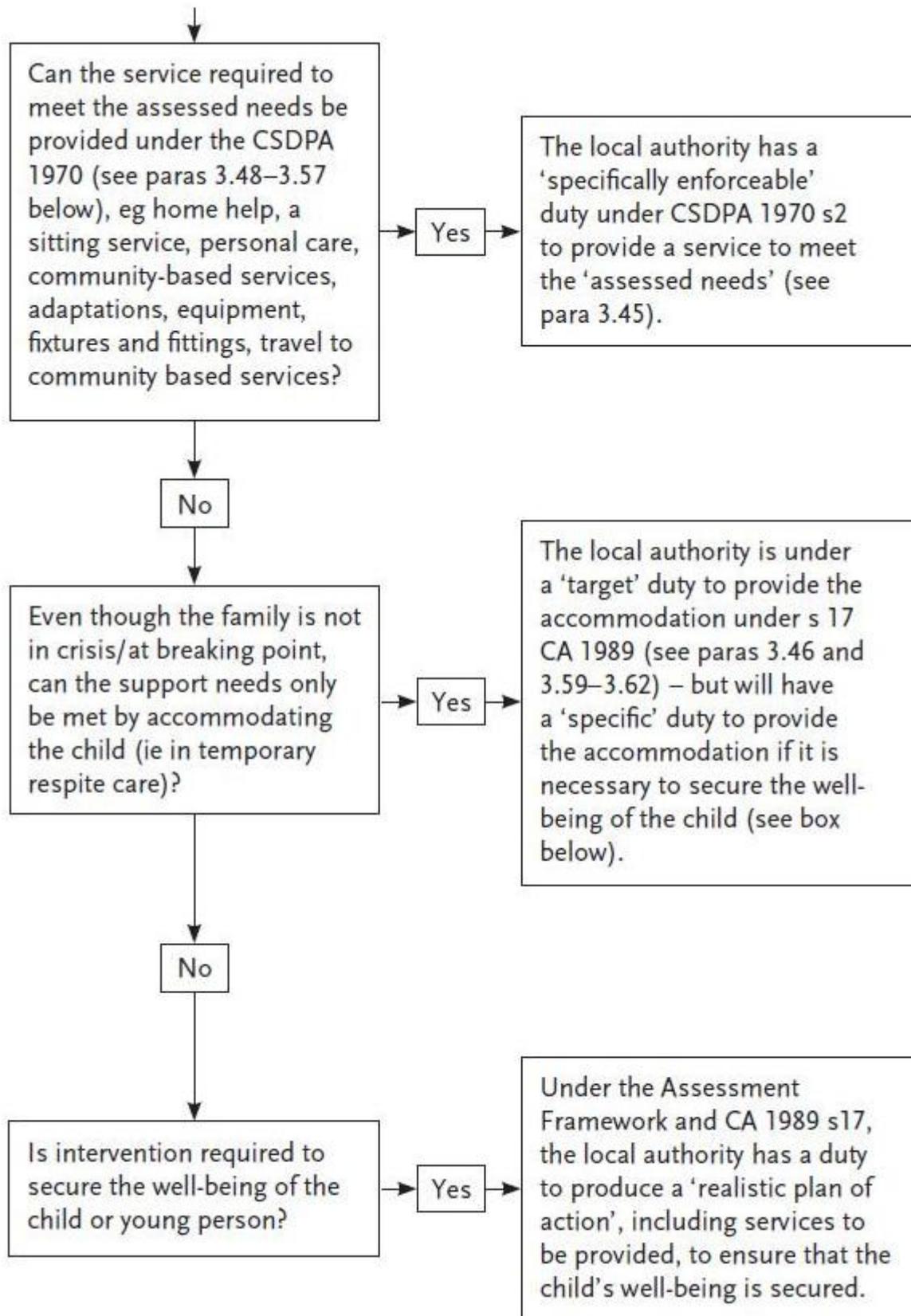
If the local authority decides that its support must be provided, for example because a failure to do so is likely to cause significant harm to the child and/or the family, then the following questions should be asked in sequence:

Can the support needs only be met by accommodating the child – because the family is in crisis/at breaking point? (See paras 3.78–3.83.)

Yes

The local authority is under a ‘specifically enforceable’ duty to provide the accommodation under CA 1989 s20(1) (see para 3.79).

No



- 3.29 The issue of when a specific duty (see para 2.29) arises to provide a service to meet an individual disabled child's identified needs is discussed in detail below. In short, the key issue is whether the -criteria for the specific duties in CSDPA 1970 s2 (a duty which is often -neglected but is of critical importance, see paras 3.48 – 3.57) or CA 1989 s20 to arise are met or, if not, whether 'intervention is -required' under CA 1989 s17 to 'secure the well-being of the child'. An overview of the service provision decision process is provided first by diagram 1.
- 3.30 Situations where the disabled child's needs require the provision of accommodation will be relatively infrequent. Much more frequently, the local authority will be under a specific duty to provide support in one of the ways identified in CSDPA 1970 s2. Where a child needs a service which is not listed in section 2 of the 1970 Act (for instance a residential short break outside the family home), then the duty is to provide it under CA 1989 s17 to the extent necessary to secure the child's well-being. Whether it is 'necessary' to provide a service to secure an individual disabled child's well-being is entirely case-specific – albeit that it may well be difficult for an authority to justify a decision to provide no services following an assessment of a child with moderate or complex disabilities.
- 3.31 Unfortunately as a matter of law, the relationship between the 1970 and 1989 Acts is even more perplexing than outlined above. Thankfully this is a technical complexity that is not of relevance in practice. The difficulty arises from the references in CSDPA 1970 s2(1) to -National Assistance Act (NAA) 1948 s29, one of the key legislative provisions for adult social care. In essence CSDPA 1970 requires that any services that are provided under section 2(1) are to be provided in the 'exercise of [the authority's] functions' under NAA 1948 s29. In relation to disabled children, this raises two difficulties. The first is that although services under CSDPA s2 can be provided to disabled children,⁴⁰ services under NAA 1948 s29 can only be provided to disabled adults. The second concerns the fact that the duty to provide services under NAA 1948 s29 is generally considered to be a 'target' duty whereas the duty to provide under section 2 has been held to be 'specifically enforceable' (see paras 2.28 – 2.31). In a series of cases the courts have sought to make sense of this drafting minefield⁴¹ and *R (Spink) v Wandsworth LBC*⁴² held that: (1) services provided under section 2 of the 1970 Act are in fact provided by a local authority in the 'exercise of their functions' under Part III of the 1989 Act and (2) such services when so provided are provided under a specifically enforceable duty.
- 3.32 Complex as the legal distinction may be between services provided under the 1970 and 1989 Acts, in practice there is generally going to be little difference in outcomes, since even if a service is provided pursuant to the 'less enforceable' provisions of the 1989 Act, a local authority's scope for declining to provide it are severely constrained (see the analysis at para 3.46).
- 3.33 Regardless of which duty a local authority is providing services under, it is essential that the nature and extent of the services to be provided are clearly set out in a care plan.⁴³ The importance of the assessment leading to a 'realistic plan of action' where a child's well-being so requires has been demonstrated in a number of cases. In *R (J) v Caerphilly CBC*,⁴⁴ the court held that a 'detailed operational plan' should

result from the assessment process (in that case the pathway planning process for a young person leaving care, see paras 10.71 – 10.73). Similarly, in *R (AB and SB) v Nottingham CC*⁴⁵ the council's assessment and care plan were struck down by the court because 'there was no clear identification of needs, or what was to be done about them, by whom and when.'⁴⁶ The same approach was followed by the court in *R (S) v Plymouth CC*,⁴⁷ where the assessments were quashed because they failed to result in a 'realistic plan of action' to meet the child's needs in relation to housing and respite care.

The service provision decision

- 3.34 As we have seen above, while children's services authorities are obliged to assess disabled children in accordance with the mandatory requirements of the Assessment Framework, they are not obliged to provide services as a consequence, unless a decision is reached that this should happen (ie because the duty under CSDPA 1970 s2 arises, or under CA 1987 s17 'intervention will be required' to secure the well-being of the child).⁴⁸
- 3.35 The process of 'so deciding' requires that authorities act rationally, follow agreed procedures which are explained to the child/-family in question and produce a decision for which clear and logical reasons are provided. At law, therefore, there are two distinct issues: (1) the process of deciding what services are required (referred to in this chapter as the 'service provision decision'); and (2) the legal consequences that flow once an authority decides that services are required (essentially the enforceability of that decision).

The use of eligibility criteria

- 3.36 Sadly these distinct processes (the service provision decision and the consequences of the decision) are sometimes confused. The confusion relates to the notion of 'eligibility criteria' – which in itself is not surprising, since as Lord Laming observed in his Victoria Climbié Inquiry Report⁴⁹ their use 'to restrict access to services is not found either in legislation or in guidance, and its ill-founded application is not something I support'. Eligibility criteria are, of course, criteria which are used to determine eligibility, and the confusion relates to the question: 'eligibility for what?'
- 3.37 As we have seen above, children's services authorities are under a statutory duty to assess all children in need. Accordingly, it would be unlawful for a local authority to impose its own 'eligibility criteria' for assessments. This would constitute an extra-statutory hurdle for a child to cross. However, once a child has been assessed, the law does not require that services be provided in every case.
- 3.38 Various statutory provisions require social services/children's services departments to provide support for disabled children. The most important of these comprise CA 1989 and CSDPA 1970 s2. However, other provisions do exist and one of these,

Mental Health Act 1983 s117, is considered briefly at para 5.82.

- 3.39 The general duty⁵⁰ to provide support services under CA 1989 Part III (see para 3.58) is triggered by the authority 'determining' (s17(4A)) that the provision of services is 'appropriate' (s17(1)). The specifically enforceable duty⁵¹ under CSDPA 1970 s2 (see para 3.48), is triggered by the authority being 'satisfied' the services are 'necessary'.⁵² Arguably there is very little, if any, difference between these two tests. In practice, a local authority could (and perhaps 'should')⁵³ decide that it will only 'determine' that the provision of services is 'appropriate' under CA 1989 Part III when it is satisfied these are necessary (ie the test for accessing support under the 1970 Act). If this is right then the same decision must effectively be made regardless of which Act the decision is being taken under.
- 3.40 It follows that it is reasonable for an authority to state that a disabled child will not as a general rule be 'eligible' for support services unless the authority is satisfied that these are necessary. This then requires that the authority explains the process by which it will decide whether or not a child is 'eligible' – ie the criteria it uses to make this judgment. The use of 'eligibility criteria' in this context has been held to be lawful by the courts.⁵⁴
- 3.41 Such criteria must, however, promote the objects of the legislation, ie that so far as possible disabled children be brought up by their families⁵⁵ and that the services provided should seek to minimise the effects of their disabilities and give them the opportunity to lead lives which are 'as normal as possible'.⁵⁶ Given that resources are limited, the criteria should also contain an element of 'prioritisation' – ie it is legitimate for authorities to target those in most need and to devote resources where they can have the most positive impact.⁵⁷ While the use of such criteria is well developed in relation to adult care law⁵⁸ this is not so for children's services. In *R (JL) v Islington LBC*,⁵⁹ Black J stressed the 'pressing need' for government guidance on eligibility criteria for children services, given that many local authorities have, at best, imperfect, and, at worst, unlawful criteria. As Clements and Thompson observe (para 24.36), all too often these:
- are poorly publicised and formulated with little or no consultation. It appears that in many cases, access to support services is measured largely by assessing the imminence of family breakdown. Thus if it is imminent or has occurred, resources can be accessed, but not otherwise. Clearly such criteria cater for the needs of children suffering abuse or neglect but are likely to be inappropriate for many families with disabled children or young carers. In practice such policies deny support to families until such time as they fall into (or are at severe risk of falling into) the child protection regime: effectively therefore they cater, not for CA 1989 Part III (provision of services for children and their families) but for Part VI (child protection).
- 3.42 It is permissible therefore, for children's services authorities to operate eligibility criteria to limit access to services. However, the principles of public law and departmental guidance⁶⁰ demand that there must be a rational process for deciding which children are eligible for services and which are not. Eligibility criteria must

therefore:

- be transparent (because both of the policy expectation – see, for example, the Aiming High for Disabled Children ‘core offer’⁶¹ – and to comply with public law duties and an authorities’ obligations under ECHR article 8);⁶²
- explain in clear ‘everyday language’ how services are allocated on the basis of need;
- take account of the impact of disability on children and families; and
- have been the subject of consultation which has taken into account (among other things) the relevant equality duties, particularly the duty under the Equality Act 2010 s149⁶³ (see paras 9.73 – 9.85).

3.43 The human rights obligations on public bodies (particularly article 8: see para 3.46) additionally require that any criteria they operate must not be so strict as to deny support where there is a real risk of significant harm⁶⁴ to the child or family if support is not provided (being harm that is more than minor or trivial).⁶⁵

3.44 The lawfulness of one example of eligibility criteria for disabled children’s services was tested in *R (JL) v Islington LBC (2009)*⁶⁶ where the court held the criteria to be unlawful for a variety of reasons, including that i) they sought to limit access to services regardless of the outcome of the assessment (through imposing an upper maximum limit on the support that could be provided – in this case respite care) and ii) in formulating the criteria the council had failed to have proper regard to its general disability equality duty under (what is now) the Equality Act 2010 s149⁶⁷ (see paras 9.73 – 9.85).

Duty to meet ‘assessed needs’

3.45 Once it has been decided that a child’s or family’s needs are sufficient to meet the statutory tests under CSDPA 1970 s2 or the Assessment Framework/CA 1989 s17, as set out locally in the authority’s eligibility criteria, then there is an obligation on the authority to provide services and support to meet the assessed need(s). Generally, but not always, this is a straightforward legal obligation. The complication arises from the nature and the ‘enforceability’ of the legal duties underlying the obligation. Put simply, the duty to provide a service under the CA 1989 is generally less ‘enforceable’ than the duty to provide a service under CSDPA 1970 s2. The services available under the 1970 and 1989 Acts are considered separately below, but certain general points can be made:

- Services assessed as required under the 1970 Act must be provided – regardless of resources. Once a child/family has been assessed as eligible for support under the 1970 Act there is a specific duty (see para 2.29) to provide them with services to meet their assessed needs, a duty which cannot be avoided because of lack of resources.⁶⁸ As the court stated in *R v Kirklees MBC ex p Daykin (1998)*:⁶⁹

Once needs have been established, then they must be met and cost cannot be an excuse for failing to meet them. The manner in which they are met does not have to be the most expensive. The Council is perfectly entitled to look to see what cheapest way for them to meet the needs which are specified.

It follows that councils cannot, in such situations, seek to delay or attempt further rationing – for instance by placing a person on a waiting list⁷⁰ or suggesting that the case needs to go to a ‘panel’.⁷¹

- If a service can be provided under either CA 1989 or CSDPA 1970, then it is provided under the 1970 Act.⁷² In essence, the reason for this is that the more enforceable duty under the 1970 Act trumps the lesser duty under the 1989 Act – or put another way, a local authority cannot escape its obligations by choosing to provide a services under a less enforceable provision.
- As will be seen below, the broad range of services available under the 1970 Act means that most services for disabled children and their families are therefore provided under the 1970 Act.

3.46 Even if a service is assessed as needed under the 1989 Act (ie because it cannot be provided under the 1970 Act) this does not mean that a local authority need not provide it. Although in such cases there is a target duty⁷³ not a specific duty (see paras 2.29 – 2.30) it is important to distinguish this from a mere ‘power’. When ‘intervention is required’, the obligation under the Assessment Framework requires that the local authority produce a ‘realistic plan of action (including services be provided)’. Furthermore, local authorities should meet their duties unless they have good reasons for failing so to do. The key considerations in such are likely to be:

1) As above, local authorities must have clear, published criteria explaining how they will decide who should get support services; these criteria must have been the subject of consultation and have been subjected to a rigorous assessment of their potential impact on disabled people as required by the Equality Act 2010 s149.⁷⁴

2) Local authorities cannot adopt general exclusions or rigid limits or lists of services that will not be provided – for example, excluding all children with Asperger syndrome from disabled children’s services, having caps or ceilings on the amount of service to be provided (eg a maximum of 100 hours per year of short breaks), or stating that ‘out of county residential respite will not be provided’. To do any of these things would, in public law terms, be to ‘fetter their discretion’ to meet their general duties in such cases.⁷⁵

3) A local authority that is not providing a service to meet a need, must be able to demonstrate that it has complied in all material respects with the relevant guidance,⁷⁶ eg the Assessment Framework policy and practice guidance.

4) The more severe the consequences of not meeting a need, the more ‘anxiously’ will the courts and the ombudsmen scrutinise the reasons given by the council for

not responding to that need,⁷⁷ any actions taken in trying to meet the needs⁷⁸ and the process by which the council arrived at its decision.⁷⁹

5) Where a fundamental human right is likely to be violated by a failure to provide support – such as in particular the right to respect for personal dignity⁸⁰ or family life⁸¹ under article 8 of the ECHR – the ‘positive obligations’ of the state may mean that an authority has no choice but to meet its general duty and provide the service: see para 2.7.⁸²

3.47 It should be emphasised that it will only be in rare cases that the service required cannot be provided under CSDPA 1970: see below. Furthermore, in all cases, if the authority considers that it is necessary to provide services to secure the child’s well-being, the general duty under CA 1989 s17 is made into a specific duty to provide services by the Assessment Framework: see para 3.33.

Services under the Chronically Sick and Disabled Persons Act 1970

3.48 CSDPA 1970 s2 provides a list of services that councils must make available to disabled people (children⁸³ or adults). In practice this includes services of great importance, such as short breaks (also known as ‘respite care’, although many disabled people object to this language), day activities, equipment, adaptations and so on. As noted above, if a service can be provided to meet an assessed need under CSDPA 1970 s2, there is a specific duty to provide it which cannot be avoided by an authority claiming to be acting under CA 1989 s17. The list of services which can be provided under CSDPA 1970 s2 is summarised below.

Practical assistance in the home

3.49 The provision covers a very wide range of home-based (sometimes called ‘domiciliary’) care services, although it does not cover healthcare services even if these do not have to be provided by qualified health professionals.⁸⁴ In practice the services provided under this provision include personal care in the home such as bathing, help using the toilet, moving and helping with feeding and routine household chores. Importantly, this provision also includes respite/short break care if provided as a sitting-type service in the home or through home-based child support or play workers.

Home-based respite care/short breaks

3.50 Short break or respite care is a ‘highly valued’ service⁸⁵ – giving families and the disabled child the chance to have time apart – or at least time when the family is not providing care or supervision. It is identified in policy documents as well as by families themselves as one of the most important support services that can be provided.⁸⁶ The key element of good practice is that a service is arranged that is of benefit to all family members, including the disabled child. Home- and -community-based short breaks take a wide variety of forms such as sitting-in and befriending schemes for children and young -people of all ages. Home-based short breaks

are provided under section 2(1)(a) of the 1970 Act (ie as 'practical assistance in the home') and community-based support is provided under section 2(1)(c) (ie as -recreational/educational facilities 'outside his home' – see below). Some short breaks are linked to a disabled child's preferred leisure activities, for instance a play scheme at a local football club, horse riding, swimming etc. If a child has a need for short break/respite care which cannot be provided in their own home or a community-based setting and which has to be provided in a care home or foster placement (ie away from the child's home) then it cannot be provided under the 1970 Act and will generally be provided under CA 1989 (see paras 3.59 – 3.62).

Wireless, television, library, 'or similar recreational facilities'

3.51 The use of the phrase in CSDPA 1970 s2 of 'or similar recreational facilities' means that in today's electronic age, this provision could include such things as a computer, gaming consoles and other recreational equipment.

Recreational/educational facilities

3.52 As with 'practical assistance in the home' above, this provision is particularly wide in its potential scope – covering community-based activities such as day centres and after-school or school holiday clubs as well as specific recreational/educational support activities that the assessment of need identifies as of importance to the child's development and sense of well-being. Clearly services under this provision may also include an element of respite/short break, since if the child is being provided with care and support in the community, then he or she is having a short break from his or her family (and in this context see para 3.50).

3.53 While local authorities fund the attendance of many disabled children at community-based day centres, play schemes, holiday clubs etc, not infrequently these facilities are used by other disabled children whose parents pay for the service themselves (ie without any local authority support). While this may be because their needs have been held to be insufficiently great to be eligible for support (see paras 3.45 – 3.46) it can be because there has been no proper assessment – and if this is the case, a request should be made for the authority to undertake one. A not uncommon indication that such an assessment is required is when the community-based service -decides that it is unable to meet the child's needs because they are so demanding (for example, that there is a need for 1:1 care).

3.54 Services under this provision include those which assist the disabled person 'in taking advantage of educational facilities' that are available to him or her. Although this does not cover the actual provision of education, it is aimed at providing support that enables the disabled person to access education – for example, help with their personal care requirements while they pursue their studies,⁸⁷ as well as escorted travel to and from it and possibly the provision of -additional facilities at the institution⁸⁸ (although these might also be required under the Equality Act 2010⁸⁹ – see paras 9.55 – 9.72 below).

Travel and other assistance

3.55 Councils must, when assessing a disabled person's need for -community-based support, also consider that person's travel needs to enable him or her to access that service. It is not acceptable for a local authority to have a blanket policy that it will not provide such transport – or for it to state that a disabled person's mobility component of disability living allowance should be used to cover this. While councils are permitted to charge for services under the 1970 Act (see paras 3.92 – 3.93 below) the law requires that in assessing the charge, entitlement to the mobility component of disability living allowance must be ignored.⁹⁰

Home adaptations, fixtures and fittings

3.56 This provision covers situations where an authority assesses a disabled person (child or adult) as needing adaptations to the home in which they live, or the provision of additional fixtures and fittings. These can include such things as ramps, grab handles, wheelchair accessible showers and can extend to major works such as through floor lifts and ground-floor extensions. Frequently the authority may ask the family to apply for a Disabled Facilities Grant to meet some or all of the cost of this work – and these grants are considered further below (see chapter 6). It is, however, important to note that the fact that a grant may be available does not detract from the core duty under the CSDPA 1970 – so (for example) if the cost of the works that are required exceeds the current maximum mandatory grant (see para 6.34), then the council will have to consider making the additional sums available to comply with its duty under section 2 of the 1970 Act.⁹¹

Holidays, meals and telephones

3.57 Once satisfied that the child meets the authority's eligibility criteria for support, the authority must consider if this need for support can and should be met by the provision of (or assistance in obtaining) a holiday, meals and/or a telephone (including any special equipment necessary to enable it to be used including such things as minicomms and other electronic items). While it might be seen as anomalous to include such items, it is arguable that holidays – in particular – are of great importance to a child's development and a family's sense of well-being.⁹²

Services under CA 1989 Part III

3.58 Although the range of services which can be provided under the 1970 Act is very wide, there are some services that disabled children and their families need that do not fall within the terms of that Act. One such service is the provision of accommodation for children and families together – for which a power is expressly provided in CA 1989 s17(6).⁹³ However, a more commonly encountered support service which cannot be provided through the 1970 Act is residential short breaks (still frequently referred to as 'respite').

Respite care/short breaks away from the home

3.59 As noted above, while much short break/respite care is provided under the 1970 Act in the home or community (or via Direct Payment (see paras 3.63 – 3.66 below), it may also be provided in residential units, in hospices or by foster carers. In *R (JL) v Islington LBC*⁹⁴ the court confirmed that residential and other overnight short break care (eg with a short-term foster carer) could not be provided under the 1970 Act and that as a general rule such support is provided by councils pursuant to their powers under CA 1989 s17(6) or s20(4).⁹⁵ When determining whether such care should be provided to meet an -assessed need, the authority must comply with the obligations detailed above (see paras 3.45 – 3.46).

3.60 The duty to provide respite care under the CA 1989 has been reinforced by an amendment⁹⁶ such that CA 1989 Sch 2 para 6(c), when the amendment comes into force,⁹⁷ will require authorities to:

Assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

3.61 In the *Islington* judgment, the judge (Black J) considered that in limited circumstances residential and other overnight short breaks care might be provided because of a council's duty under CA 1989 s20(1) (see below, paras 3.78 – 3.83). This is of importance, since the duty under section 20(1) is not a power or 'target duty' but one that is specifically enforceable (see para 2.29). In the judge's opinion, however, the section 20(1) duty would only arise to when a parent was 'immediately' prevented from providing a disabled child with suitable care and accommodation.⁹⁸

3.62 Any placement made under CA 1989 s20 must accord with the requirements of the Arrangements for Placement of Children (General) Regulations 1991 (see para 3.86).⁹⁹ These regulations will be replaced in England from 1 April 2011 by the Care Planning, Placement and Case Review (England) Regulations 2010,¹⁰⁰ which have far more detailed requirements in relation to placements of children in need, including disabled children.

Direct payments

3.63 Instead of the authority arranging for services to be provided to a disabled child, the parents (or the child if aged 16 or 17) can generally insist on having the support by way of a 'direct payment' and can then use that payment to buy the necessary services (including periods of residential short breaks/respite care away from the child's own home). The right to insist on a direct payment applies regardless of whether the support is provided under the CSDPA 1970 or the CA 1989.¹⁰¹ The statutory scheme governing direct payments derives from CA 1989 s17A and has been fleshed out by regulations¹⁰² and detailed guidance¹⁰³ issued under the Health and Social Care Act (HSCA) 2001 which place a duty on children's services authorities to make a direct payment in certain situations.¹⁰⁴ The

conditions are that:

- the person appears to the responsible authority to be capable of managing a direct payment by themselves or with such assistance as may be available to them;
- the person consents to the making of a direct payment;
- the responsible authority is satisfied that the person's need for the relevant service can be met by securing the provision of it by means of a direct payment; and
- the responsible authority is satisfied that the welfare of the child in respect of whom the service is needed will be safeguarded and promoted by securing the provision of it by means of a direct payment.

3.64 The regulations¹⁰⁵ restrict the use of direct payments to pay a relative who lives in the same household as the disabled child. There is, -however, no restriction if the relative lives elsewhere. Accordingly paying such a relative, who may well know and have a good relationship with the child, to provide care may be a very attractive option for families. However, if the relative lives in the same household, the presumption is that he or she may not be paid with the direct payment – unless the authority 'is satisfied that securing the service from a family member is necessary for promoting the welfare of the child'. In simple English, this means that the council can agree to such a payment, if it is satisfied that it is necessary – ie the threshold for reversing the presumption against such an arrangement is a relatively low one.

Direct payments and respite care/short breaks

3.65 Where a disabled person has been assessed as needing a service, then in general there is a duty to make the provision by way of a direct payment if so requested. In this context the ombudsman has held it be maladministration for a local authority:

- to require a parent carer to give reasons why he wanted a direct payment in lieu of a service, and for the authority to state 'that direct payments would not be paid for childcare and that childcare was the responsibility of the parents, whether or not children have a disability';¹⁰⁶ and
- to have a policy of refusing direct payments for certain services – such as short (overnight) breaks.¹⁰⁷

3.66 Although direct payments cannot be used to purchase prolonged -periods of residential respite care (being capped at a maximum of four consecutive weeks in any period of 12 months)¹⁰⁸ in practice as long as the residential care periods are less than four weeks long and are separated by at least four weeks of non-residential care, then successive such periods are permitted.¹⁰⁹

Independent user trusts

3.67 Although the Direct Payment Regulations¹¹⁰ permit payments to be made to persons with parental responsibility for a disabled child, such arrangements must come to an end when the child becomes 18. At this stage, the payment must either be paid to the disabled person (if he or she wishes to continue with a direct payment) or if he or she lacks sufficient mental capacity to consent to the payment, then it can (in England)¹¹¹ be paid to someone on his or her behalf – if (among other things) that third party agrees. It follows that on a child becoming an adult, a significant change in the payment arrangements has to take place. One way of seeking to avoid such disruption is for the carers of the disabled child to create a trust (or a company limited by guarantee) – variously called an ‘Independent User Trust’, ‘User Independent Trust’ and a ‘Third Party Scheme’. The trust then -assumes responsibility for ensuring that services are provided to meet the assessed needs of the disabled person – for example, by employing care assistants and/or paying an independent agency etc. Not infrequently the parents of a disabled child will be the initial trustees of such a trust. Such arrangements, which the courts have held to be lawful,¹¹² have a number of practical benefits over and above securing continuity of care arrangements during the transition into adulthood (see paras 10.49 – 10.60 below) – and these include the fact that the NHS is also permitted to make payments to such a trust (see para 5.64 below).¹¹³

Individual budgets and personalisation

3.68 Many children and families will now be told that their entitlement to services will take the form of an ‘individual budget’ or ‘personal budget’. This is a core part of the ‘personalisation’ agenda, which is starting to take hold in children’s services. However, it is essential to note that the only legal basis for ‘personalisation’ is the Direct Payments legislation (see paras 3.63 – 3.66), and any attempt to use personalised approaches to avoid the assessment and service provision duties set out above will be unlawful.

3.69 Adult care services in England have been the subject of the Department of Health’s personalisation agenda since 2005. The programme seeks to make services and supports more responsive to the needs of disabled people by putting them at the centre of the process – and if possible by giving them a direct payment so they can be in control of their care arrangements. Since many disabled people consider that managing a direct payment is too onerous an undertaking, the English government has proposed an intermediate arrangement, whereby the disabled person is advised how much the local authority is devoting to his or her care and then encouraged to decide¹¹⁴ what other ways the money could be spent to maximise their sense of independence and well being. In this intermediate phase, instead of a direct payment being made to the disabled person the -monies are retained by the local authority and referred to as a ‘personal budget’: with the disabled person or their parents (if a child) encouraged to exercise as much control as they wish over directing how the -budget is used. Ultimately the government in England would like these budgets to include not only social services monies but other

funds the disabled person receives (such as funding from the Independent Living Fund as well as income received from the Supporting -People's scheme, Disabled Facilities Grants, Access to Work -monies and so on): these budgets are referred to as 'Individual Budgets'. The personalisation programme is still only being piloted in relation to children's services, but councils in England are being encouraged to find ways of incorporating its aims in their commissioning arrangements.¹¹⁵

- 3.70 While many of the principles underpinning the personalisation agenda are admirable, it has had its critics¹¹⁶ and the implementation has caused not insignificant difficulties – particularly in relation to what are termed 'Resource Allocation Systems/Schemes' (RAS). These are crude systems that endeavour to give a disabled person an indication of the resources that the council would be prepared to expend on his or her care – before the care planning process has been completed. They are sometimes referred to as 'upfront allocations' or 'indicative amounts'. The calculation is generally based on a questionnaire that the disabled person has completed. This awards 'points' which are then converted into an indicative financial amount. The idea is that disabled people may opt for this sum – and then make their own arrangements – without having to go through the whole care planning process, which would involve the detailed assessment of the actual cost of a real care package.
- 3.71 Admirable as this may sound, in practice the process is often disempowering – so that disabled people do not appreciate that they have a choice to have a direct service instead of a personal budget (for, as noted above, the 'personalisation' programme is underpinned by no law). Children and families may be given to believe that they have little or no option but to accept the 'indicative amount' even though this may be less than they are presently receiving or insufficient to enable them to have their care needs addressed satisfactorily.¹¹⁷ In law, individuals are entitled to decline having a personal budget and to insist that their care package be provided by the local authority or that any sum they have (eg as a direct payment) be sufficient to purchase a satisfactory package of care to meet their needs. The fact that the local authority advises them that their care costs are above the 'indicative amount' generated by a RAS is simply irrelevant: the legal duty remains (as indicated at paras 3.45 – 3.46) to meet eligible assessed needs.

Timescales for assessments and providing services

- 3.72 As noted above (para 3.15) the Assessment Framework lays down detailed and tight timescales for the completion of assessments – just eight working days for an initial assessment and accompanying care plan. Where delay occurs either in the assessment or the provision of services then the complaints process may be invoked (see paras 2.41 – 2.44) since this will at least put the process on a fixed timescale (ie that for investigating the complaint).
- 3.73 In relation to the provision of services, the law requires that these be provided within a 'reasonable time'; the Assessment Framework expresses this obligation in terms of the plan of action being 'realistic'. What is a 'reasonable time' is a question

of fact, depending on the nature of the obligation and the purpose for which the decision is to be made.¹¹⁸ Generally the disabled child and/or the family will have a good idea of what is reasonable and what is not unreasonable (for example, how urgent the need is and what steps the council has actually taken to meet its obligations). Where the period seems excessive then the reasons why this is thought to be the case should be explained, in ordinary language, in any complaint.

- 3.74 The local government ombudsman has investigated a considerable number of complaints concerning delayed assessments relating to home adaptations (see chapter 6). In a 1996 report,¹¹⁹ for example, a delay of six months in assessing a disabled person's needs was held to be maladministration, and another 1996 report found seven months for an assessment and a further four months' delay by the authority in processing the disabled facilities grant approval to be maladministration.¹²⁰ In this complaint the local ombudsman reiterated her view that if the authority has a shortage of occupational therapists, it should not use them for assessment purposes if this will result in unreasonable delay, stating, '[i]f such expertise is not available, councils need to find an alternative way of meeting their statutory responsibilities'. Where a delay arises because there is a physical shortage of services (for example, no place available at a day centre) the court will require that short-term alternative arrangements be made to meet the identified need as well as steps taken by the council to address the structural 'supply side' problem, if there is one (eg the shortage is not a 'one-off' but a chronic problem).¹²¹
- 3.75 In general if the shortage is due to a budgetary problem it will not be an acceptable excuse – as the court has noted:¹²²

Once a local authority has decided that it is necessary to make the arrangements, they are under an absolute duty to make them. It is a duty owed to a specific individual and not a target duty. No term is to be implied that the local authority are obliged to comply with the duty only if they have the revenue to do so. In fact, once under that duty resources do not come into it.

Conclusion: the need for services to promote dignity

- 3.76 To conclude on the duty to provide services, it should be remembered that in keeping with the state's obligations under the European Convention on Human Rights (ECHR), the purpose of assessment and care planning must be to promote and protect the inherent dignity of disabled children. In *R (A, B, X and Y) v East Sussex CC*¹²³ the High Court stated (at [86]) that:

The recognition and protection of human dignity is one of the core values – in truth the core value – of our society and indeed all societies which are part of the European family of nations and which have embraced the principles of the [European Convention on Human Rights].

3.77 The obligations on children's services authorities to provide services to meet disabled children's assessed needs must therefore be seen in the context of the state's convention obligations, and in particular the positive obligations under ECHR article 8, to ensure decent and dignified standards of living for disabled children, where possible with their families. The service provision decision therefore needs to be taken with due regard to all the general principles and human rights standards set out in chapters 1 and 2.

Duty to accommodate disabled children

3.78 As noted above, in general where a local authority facilitates short break/respite care in a way which involves the child spending a -period in a residential care (or substitute family) placement, then this care is considered to be provided as a general support service under CA 1989 s17. However, if the placement arises because 'the person who has been caring' for the disabled child is 'prevented ... from providing him with suitable accommodation or care' for whatever reason, then the care is provided under a different section of CA 1989, being -section 20(1). This distinction is important, because the duty to provide accommodation under CA 1989 s20(1) is a 'specifically enforceable' duty¹²⁴ and a child accommodated under this duty is considered to be 'looked after' by a local authority.¹²⁵ Residential short breaks may also be provided under the authority's power to accommodate pursuant to section 20(4) of CA 1989 – but only if the qualifying criteria for the section 20(1) duty are not met on the facts of the individual case.

3.79 In *R (G) v Southwark LBC*,¹²⁶ the House of Lords confirmed that where the qualifying criteria in CA 1989 s20(1) are met, an authority is under a specific duty to accommodate a child under that section. This duty trumps the power to accommodate a child under CA 1989 s17(6) and children's services authorities cannot avoid their section 20(1) obligations by referring children in need of accommodation to housing authorities or providing 'help with accommodation' under CA 1989 s17.

3.80 As noted above (see para 3.61), Mrs Justice Black held in *R (JL) v Islington*¹²⁷ that the 'prevention' referred to in CA 1989 s20(1)(c) had to be current, and that the duty only arose (in effect) at the point of crisis. Where a disabled child is placed away from home, including at a residential special school (see paras 4.74–4.80), it will therefore be a question of fact as to whether the placement is made pursuant to CA 1989 s20(1)(c).

3.81 It follows that the section 20(1) duty to accommodate may not be triggered until a family is close to 'breaking point' and the parents at risk of no longer being able to provide the necessary care to the disabled child (and potentially any non-disabled siblings). The precise wording of the relevant limb of the section 20(1) duty states that the duty to accommodate arises where the child requires accommodation as a result of:

- (c) the person who has been caring for him being prevented (whether or

not permanently, and for whatever reason) from providing him with suitable accommodation or care.

- 3.82 It is important to bear in mind that accommodation under CA 1989 s20(1) is voluntary, in other words that a child cannot be accommodated under this duty if a person with parental responsibility who is willing and able to provide accommodation objects (CA 1989 s20(7)).¹²⁸ Before providing accommodation an authority must give due consideration to the wishes and feelings of the child, although these may not be determinative.¹²⁹ Authorities must additionally consider the child's wishes and feelings throughout any placement. Accordingly in *R (CD) v Anglesey CC*¹³⁰ the High Court criticised the respondent council for attempting to end a successful fostering arrangement for a 15-year-old severely disabled girl and requiring her to reside at an establishment 'to an extent substantially contrary to her wishes and feelings'.
- 3.83 In relation to children accessing overnight or residential short breaks, it should be remembered that these arrangements only engage the CA 1989 s20(1) duty if all the qualifying criteria are met. In particular, if the parents are not 'prevented' from providing suitable accommodation and care but the short breaks are being provided to promote the child's well-being and support positive family life, then the service is being provided under CA 1989 s17 or s20(4). The Care matters: time for change white paper emphasised that 'looked after' status 'should not be an automatic response to the use of [respite care]'.¹³¹

Duties towards accommodated disabled children

- 3.84 Any disabled child who is accommodated under CA 1989 s20(1) duty (or indeed the section 20(4) power)¹³² is a 'looked after' child for the purposes of CA 1989: see CA 1989 s22(1)(b). For this to apply, the accommodation must be provided for a continuous period of more than 24 hours (CA 1989 s22(2)). A children's services authority does not acquire parental responsibility for children it is voluntarily accommodating; responsibility remains with the child's mother or parents (CA 1989 s2).
- 3.85 Children's services authorities do, however, have additional duties towards disabled children who are 'looked after' (as they do to all 'looked after' children), including the provision of accommodation and maintenance.¹³³ Furthermore, once amendments made in 2008 come into force, under CA 1989 s22C¹³⁴ authorities will have to:
- place the child in what is, in their opinion, the most appropriate placement available;¹³⁵
 - place the child within the local authority's area, unless that is not reasonably practicable;¹³⁶ and
 - ensure so far as is reasonably practicable that the placement is close to the

child's home, does not disrupt the child's education or training and is suitable to the child's particular needs as a disabled child.¹³⁷

- 3.86 Placements of children away from home are currently governed by the Arrangements for Placement of Children (General) Regulations 1991.¹³⁸ These regulations impose additional duties on children's service's authorities in respect of 'looked after' children, including requirements to have regard to a series of health and educational considerations set out at Schedules 2 and 3 to the regulations respectively. These regulations will be replaced in England from 1 April 2011 by the Care Planning, Placement and Case Review (England) Regulations 2010,¹³⁹ which have far more detailed requirements in relation to placements of children in need, including disabled children.
- 3.87 Children's services authorities are also required to ensure that a health assessment (including physical and mental health) is undertaken as soon as possible after a child becomes 'looked after' and that this is reviewed at least annually.¹⁴⁰ In relation to education, concerns about the low attainment of 'looked after' children led to the amendment to CA 1989 s22(3)(a) by section 52 of the Children Act 2004, which aims to ensure that particular attention is given to the educational implications of decisions in relation to children's welfare.

Duties towards disabled children 'leaving care'

- 3.88 In recognition of the unacceptably poor outcomes for formerly 'looked after' children, the Children (Leaving Care) Act 2000 created a new scheme to oblige children's services authorities to continue to provide assistance to young people whom they had formerly been looking after, both disabled and non-disabled. The duties are in respect of 'eligible', 'relevant' and 'former relevant' children.
- 3.89 'Eligible' children are those who are 16 or 17 years old and have been 'looked after' for 13 weeks, either continuously or in total. In respect of 'eligible' children, children's services authorities are required to:
- assess the young person's needs and then prepare a 'pathway plan' to meet those needs;¹⁴¹
 - appoint a personal adviser to co-ordinate services, who must be independent of the authority and not the person with responsibility for the assessment or pathway plan; *R (J) v Caerphilly CBC*.¹⁴²
- 3.90 'Relevant' children are children aged 16 or 17 years old who have ceased to be 'looked after' but otherwise would have been 'eligible'.¹⁴³ Children's services authorities have a duty to 'keep in touch' with relevant children and prepare pathway plans for them.
- 3.91 'Former relevant' children are young people who are over 18 but were previously 'eligible' or 'relevant' children.¹⁴⁴ Duties towards former relevant children are

discussed in paras 10.64–10.76, where the ‘leaving care’ scheme is generally given more detailed consideration.

Charging for children’s services

- 3.92 Children’s services authorities have the power to charge for services provided under the CA 1989. Authorities may recover ‘such charge as they consider appropriate’ (CA 1989 s29(1)) and in so doing, if the child is under 16, can take into account of the financial circumstance of the parents, and if 16 or over, can take into account the child’s means (section 29(4)). However, no person can be charged while in receipt of income support or a range of other benefits (section 29(3)). Furthermore, an authority cannot require a person to pay more than he or she can reasonably be expected to pay (section 29(2)).
- 3.93 Children’s services authorities can also charge for services provided under CSDPA 1979 s2. In practice, few authorities do charge parents or children for services provided either under CA 1989 Part III or CSDPA 1970 s2.¹⁴⁵

Safeguarding and child protection

- 3.94 Local authorities have extensive powers and duties under CA 1989 to protect children from harm, including the power to intervene and remove children into their care. The fact that these powers and -duties are not considered in detail in this book should not be taken to indicate that effective and appropriate measures to safeguard disabled children are anything other than crucial. In addition, as with any children, decisions about protecting disabled children from harm are often complex. A small number of recent cases indicate, however, that the existence of these powers may give rise to fear among parents that if they find themselves disagreeing with or complaining about the council, or taking action of which the council disapproves, then they may find themselves the subject of child protection proceedings. For a local authority to misuse their powers in this way, would of course, run contrary to the entire object and purpose of CA 1989 Part III, which is that ‘local authorities should provide support for children and families’.¹⁴⁶
- 3.95 In *A Local Authority v A (A Child)*¹⁴⁷ Munby LJ made a number of observations and findings of considerable relevance to this power imbalance. The case concerned two families who each had a disabled child with Smith Mangelis Syndrome: a condition which, at times, resulted in hyperactive behaviour characterised by the person not sleeping. In order to cope and for the children to be safe, their parents (who the court held to be exemplary carers) locked them in their rooms at night. The court found that this did not amount to a ‘deprivation of liberty’ – indeed that what was occurring was of a quite -different nature and was not even close to a deprivation of the children’s liberty. This finding was important, since if it were otherwise, there would have been a duty on the local authority to take action to bring this state of affairs to an end – or at least to formalise the situation (under the Mental Capacity Act 2005) – and the court gave helpful guidance as to what an

authority ought do in such cases.

3.96 Lord Justice Munby also took the opportunity to make some very general – and important – observations about heavy handed interventions by local authorities in cases of this nature: of an attitude (which he considered [at para 50]) was ‘shared by too many other local authorities’: that they were not merely ‘involved’ with such families but that that they had ‘complete and effective control ... through [their] assessments and care plans’ [at para 51]. Of this attitude Munby LJ observed that ‘it needs to be said in the plainest possible terms that this suggestion, however formulated – and worryingly some local authorities seem almost to assume and take it for granted – is simply wrong in law.’ He continued:

52 Moreover, the assertion or assumption, however formulated, betrays a fundamental misunderstanding of the nature of the relationship between a local authority and those, like A and C and their carers, who it is tasked to support – a fundamental misunderstanding of the relationship between the State and the citizen. People in the situation of A and C, together with their carers, look to the State – to a local authority – for the support, the assistance and the provision of the services to which the law, giving effect to the underlying principles of the Welfare State, entitles them. They do not seek to be ‘controlled’ by the State or by the local authority. And it is not for the State in the guise of a local authority to seek to exercise such control. The State, the local authority, is the servant of those in need of its support and assistance, not their master. ...

53 This attitude is perhaps best exemplified by the proposition that ‘in the event that the parents were to disagree with the decisions of the local authority (which will always be based upon the opinion of relevant professionals) it would seek to enforce its decisions through appropriate proceedings if necessary’ (emphasis added). This approach, ..., though reflecting what I have come across elsewhere, reflects an attitude of mind which is not merely unsound in law but hardly best calculated to encourage proper effect being given to a local authority’s procedural obligations under Article 8 of the Convention Moreover, it is likely to be nothing but counter-productive when it comes to a local authority ‘working together’, as it must, with family carers. ‘Working together’ involves something more – much more – than merely requiring carers to agree with a local authority’s ‘decision’ even if, let alone just because, it may be backed by professional opinion.

3.97 Munby LJ referred to a number of other cases considered by the courts where a local authority had acted in such a high handed way (see para 55 of the judgment). The local government ombudsman has also expressed concern about local authorities seeking to use their child and adult protection powers inappropriately. A 2008 ombudsman complaint¹⁴⁸ concerned a local authority in dispute with a disabled child’s family over a care plan. The disagreement centered on the use of a hoist that the council considered necessary, but the family were not satisfied with the proposed arrangements and continued to carry the young man upstairs to be

bathed. Although it was accepted that his family were devoted to him, nevertheless the local authority made an adult protection referral – asserting that this was putting him at risk. The ombudsman (at para 37) held that it ‘beggars belief that the referral was made at all’. In similar vein a 2009 ombudsman complaint¹⁴⁹ concerned a mother who (because of a service failure by the council) had no option but to hose her sons down in the back garden to keep them clean. Instead of providing adequate bathing facilities, she was warned by the social services panel that cleaning them this way was ‘abusive’ – something that the ombudsman considered to be of ‘breathtaking insensitivity’ by a council that (in her opinion) exhibited an ‘institutionalised indifference’ not only to the disabled children’s needs and the mother’s plight but also to the council’s duties and responsibilities (paras 40 and 43).

3.98 The proper procedures to be followed in relation to safeguarding disabled children in England can be found in statutory guidance entitled *Working together to safeguard children*,¹⁵⁰ revised in 2010. It sets out how organisations and individuals should work together to safeguard and promote the welfare of children and young people in accordance with the CA 1989 and the CA 2004. The general principles in the statutory guidance are also supplemented by specific practice guidance in relation to disabled children.¹⁵¹ The statutory guidance emphasises the need to work sensitively with disabled children where there are concerns about their welfare, including drawing upon the expertise of specialist disability workers in any child protection investigations.¹⁵² *Working together to safeguard children* also contains a specific section on ‘abuse of disabled children’¹⁵³ which requires that ‘expertise in both safeguarding and promoting the welfare of child and disability has to be brought together to ensure that disabled children receive the same levels of protection from harm as other children’.¹⁵⁴ The guidance highlights the increased risk of abuse (particularly of disabled children away from home) and requires agencies to promote ‘a high level of awareness of the risks of harm and high standards of practice’ and strengthen ‘the capacity of children and families to help themselves’.¹⁵⁵ This brings us back to the core purpose of CA 1989 Part III – to provide support to children and families to help them lead ordinary lives.

Endnotes

- 1 Section 22(5) in Wales: the Childcare Act 2006 is considered further at para 8.26.
- 2 As specifically provided for by CA 1989 Sch 2 para 3(a).
- 3 CA 1989 s17(1)(b).
- 4 CA 1989 Sch 2 para 7(a)(i).
- 5 Formerly Disability Discrimination Act 1995 s1.
- 6 [2008] EWHC 389 (Admin) and see also chapter 9 below regarding the definitions of 'disability' and 'discrimination' under the Equality Act 2010.
- 7 See *R v Bristol CC ex p Penfold* (1997–98) 1 CCLR 315 in relation to the duty to assess adults who may be in need of community care services.
- 8 Department of Health, *Framework for the assessment of children in need and their families*, 2000, pp30 and 39; and Welsh Assembly, *Framework for assessing children in need and their families*, 2001, pp32 and 41.
- 9 Local Authority Social Services Act 1970 s6(6).
- 10 Report on complaint no 05/C/18474 against Birmingham City Council, 4 March 2008, where the ombudsman referred to Birmingham's 'corporate failure to ensure adequate resourcing and performance of its services to highly vulnerable people' (para 55).
- 11 S Mukherjee, B Beresford and P Sloper, *Unlocking key working: an analysis and evaluation of keyworker services for families with disabled children*, Policy Press, 1999; Audit Commission, *Services for disabled children: a review of services for disabled children and their families*, Audit Commission Publications, 2003; R Townsley, D Abbott and D Watson, *Making a difference? Exploring the impact of multi-agency working on disabled children with complex healthcare needs, their families and the professional who support them*, Policy Press, 2003; P Sloper, P Greco, V Beecham and R Webb, 'Key worker services for disabled children: what characteristics of services lead to better outcomes for children and families?', (2006) 32 *Child: care, health and development*, pp147–157.
- 12 Court Report, *Fit for the future: report of the committee on child health services*, Cmnd 6684, HMSO, 1976.
- 13 V Greco and P Sloper, 'Care co-ordination and key worker schemes for disabled children: results of a UK-wide survey', (2004) 30 *Child: care, health and developments*, pp13–20.
- 14 See, for example, Children's Workforce Development Council, *Lead professional:*

practitioners' and managers' guides, 2007, refreshed March 2010.

- 15 For a more detailed discussion of good assessment practice, see J Read, L Clements and D Ruebain, *Disabled children and the law: research and good practice*, 2nd edn, Jessica Kingsley Publishers, 2006.
- 16 See, for example, Department for Education and Skills, *Together from the start: practical guidance for professionals working with disabled children (birth to third birthday) and their families*, 2003.
- 17 Department of Health, *Carers and Disabled Children Act: practice guidance*, TSO, 2001.
- 18 See Department of Health, *Carers and Disabled Children Act: practice guidance*, TSO, 2001; J Cavet and P Sloper, 'Participation by disabled children in individual decisions about their lives and in public decisions about service development', (2004) 18 *Children and Society* pp278 – 290; P Rabiee, P Sloper and B Beresford, 'Desired outcomes for children and young people with complex health care needs and children who do not use speech for communication', (2005) 135 *Health and Social Care in the Community* -pp478 – 487.
- 19 HM Treasury and Department for Education and Skills, *Aiming high for disabled children: better support for families*, 2007.
- 20 There is such an express duty to assess in the primary legislation for adult social care: see NHS and Community Care Act 1990 s47.
- 21 [2003] UKHL 57; (2003) 6 CCLR 500 – the view was expressed by Lords Hope, Nicholls and Scott and influenced in part by the requirement in CA 1989 Sch 2 para 1 that 'Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area'.
- 22 The issue in *R (G) v Barnet* was whether CA 1989 s17 created a specific duty to provide services, in particular accommodation. Lord Nicholls was in the minority who held that such a duty did arise; however, his view that there was also a duty to assess was shared by Lord Hope and Lord Scott, who were in the majority. Lord Hope referred (at [77]) to CA 1989 Sch 2 para 3, which allows a children's services authority to assess the needs of a child who appears to be in need at the same time as any assessment under CSDPA 1970 and EA 1996 Part IV (a special educational needs assessment: see paras 4.28 – 4.44 below).
- 23 Department of Health, Department for Education and Employment and Home Office, *Framework for the assessment of children in need and their families (policy guidance)*, TSO, 2000: very similar guidance has been issued in Wales by the Welsh Assembly, *Framework for assessing children in need and their families*, TSO, 2001; Welsh Assembly, *Assessing children in need and their families: practice guidance*, 2001 although in this chapter, reference is made to the English guidance.
- 24 *R v Islington LBC ex p Rixon* (1997 – 98) 1 CCLR 119 at 123 J – K.

- 25 Para 3.128 of both Department of Health, *Framework for the assessment of children in need and their families practice guidance*, TSO, 2000 and Welsh Assembly, *Assessing children in need and their families: practice guidance*, TSO, 2001. Also, Welsh Assembly, *Framework for assessing children in need and their families policy guidance*, TSO, 2001, para 3.42.
- 26 As inserted by CA 2004 s53.
- 27 *R (A and B) v East Sussex CC* [2003] EWHC 167 (Admin); (2003) 6 CCLR 194.
- 28 *Assessing children in need and their families: practice guidance*, Department of Health, 2000 and published in Wales by the National Assembly for Wales (2001).
- 29 See, for example, H Westcott, 'Disabled children and child protection', in C Robinson and K Stalker (eds), *Growing up with disability*, Jessica Kingsley Publishers, 1998; D Miller, *Disabled children and abuse*, NSPCC, 2002.
- 30 [2001] EWHC 235 (Admin); (2001) 4 CCLR 294 at 306G – I.
- 31 [2006] EWHC 3164; (2007) 10 CCLR 87.
- 32 *R (G) v Barnet LBC* [2003] UKHL 57; (2003) 6 CCLR 500 per Lord Nicholls at [32].
- 33 [2005] EWHC 586 (Admin); (2005) 8 CCLR 255. This case is discussed in detail at para 10.73.
- 34 Department for Children, Schools and Families, *Common assessment framework (CAF)*, 2006, at www.dcsf.gov.uk/everychildmatters/strategy/deliveringservices1/caf/cafframework/.
- 35 Department for Children, Schools and Families, *Early Support*, 2004, at www.dcsf.gov.uk/everychildmatters/healthandwellbeing/ahdc/earllysupport/home/ – but see P Gilligan and M Manby, *The common assessment framework: does the reality match the rhetoric?* (2008) 32 *Child and Family Social Work*, pp177 – 187; S White C Hall and S Peckover, *The descriptive tyranny of the common assessment framework: technologies of categorization and professional practice in child welfare*, (2009) 39 *British Journal of Social Work*, pp1197 – 1217; H Bonnicks, 'Framework for optimism', (2010) *Community Care* 8, p8.
- 36 CA 1989 Sch 2 para 6.
- 37 Section 28 in Wales.
- 38 Department for Education and Skills, *Statutory guidance on making arrangements to safeguard and promote the welfare of children under section 11 of the Children Act 2004*, TSO, 2005.
- 39 See guidance at 2.15. For young disabled children under five, the duty to improve

the well-being of young children and reduce inequalities between young children in Childcare Act 2006 s1(1) also applies.

- 40 CSDPA 1970 s28A.
- 41 For a review and analysis of the relevant case-law, see L Clements and P Thompson, *Community care and the law*, 4th edn, LAG, 2007, paras 9.134–9.136.
- 42 [2005] EWCA Civ 302; (2005) 8 CCLR 272 at [34]–[35].
- 43 See Assessment Framework, 4.32–4.37, ‘Plans for children in need’.
- 44 [2005] EWHC 586 (Admin); (2005) 8 CCLR 255.
- 45 [2001] EWHC 235 (Admin); (2001) 4 CCLR 294.
- 46 [2001] EWHC 235 (Admin); (2001) 4 CCLR 294 at [43].
- 47 [2009] EWHC 1499 (Admin).
- 48 If a negative service provision decision is made, there is no obligation on the authority to specify what services would have met the assessed needs.
- 49 Lord Laming, *The Victoria Climbié Inquiry: Report of an Inquiry*, Cm 5730, TSO, 2003.
- 50 See para 2.30 for an explanation as to the nature of a ‘general’ or ‘target’ duty.
- 51 See para 2.29 for an explanation as to the nature of a ‘specifically enforceable’ duty.
- 52 *R v Gloucestershire CC ex p Barry* [1997] AC 584; (1997–98) 1 CCLR 40.
- 53 Not least, because CA 1989 Sch 2 permits an authority to assess a child’s needs for the purposes of CSDPA 1970 s2 at the same time as assessing under CA 1989.
- 54 *R v Gloucestershire CC ex p Barry* [1997] AC 584; (1997–98) 1 CCLR 40.
- 55 CA 1989 s17(1)(b).
- 56 CA 1989 Sch 2 para 6.
- 57 In this context see also L Clements and P Thompson, *Community care and the law*, 4th edn, LAG, 2007 (‘Clements and Thompson’), paras 24.35–24.36.
- 58 See for example, Department of Health, *Prioritising need in the context of putting people first: a whole system approach to eligibility for social care. guidance on eligibility criteria for adult social care, England 2010*; and the equivalent Welsh Assembly Government policy guidance, *Creating a unified and fair system for assessing and managing care*, 2002. See also L Clements and P Thompson, *Community care and the*

law, 4th edn, LAG, 2007, para 3.163.

59 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.

60 See in this context, Department for Children, Schools and Families, *Aiming high for disabled children: core offer*, 2008.

61 Department for Children, Schools and Families, *Aiming high for disabled children: core offer*, 2008.

62 If a local authority operated 'secret' criteria or otherwise refused to make their criteria transparent, this would not be 'in accordance with law', which is one of the requirements of ECHR article 8.

63 Formerly Disability Discrimination Act 1995 s49A; see paras 9.73 – 9.85.

64 'Significant harm' is not defined in the CA 1989, but does not include 'minor shortcomings' or 'minor defects' in care being provided; CA 1989 Guidance and Regulations, Volume 1, Court Orders (1991) Department of Health, para 3.12. See R White, A P Carr and N Lowe, *The Children Act in practice*, 4th edn, LexisNexis, 2008, paras 8.43 – 8.44 and HM Government, *Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children*, 2010, paras 1.26 – 1.31 for more on the 'significant harm' threshold.

65 In *R v Gloucestershire CC ex p Mahfood* (1997 – 98) 1 CCLR 7, DC (a pre-Human Rights Act 1998 judgment), McCowan LJ expressed this proposition in the following way: 'I should stress, however, that there will, in my judgment, be situations where a reasonable authority could only conclude that some arrangements were necessary to meet the needs of a particular disabled person and in which they could not reasonably conclude that a lack of resources provided an answer. Certain persons would be at severe physical risk if they were unable to have some practical assistance in their homes. In those situations, I cannot conceive that an authority would be held to have acted reasonably if they used shortage of resources as a reason for not being satisfied that some arrangement should be made to meet those persons' needs.'

66 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.

67 Formerly Disability Discrimination Act 1995 s49A; see paras 9.73 – 9.85.

68 *R v Gloucestershire CC ex p Mahfood* (1997 – 98) 1 CCLR 40 at 15K and 16D – H per McCowan LJ

69 (1997 – 98) 1 CCLR 512 at 525D.

70 See, for example, Local Government Ombudsman Complaint no 00/B/00599 against

Essex, 3 September 2001.

- 71 See L Clements and P Thompson, *Community care and the law*, 4th edn, LAG, 2007, para 3.183 for further discussion about the questionable legality of such 'allocation or funding' panels.
- 72 *R v Bexley LBC ex p B* (2000) 3 CCLR 15 and see also *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302; (2005) 8 CCLR 272.
- 73 *R (G) v Barnet LBC and others* [2003] UKHL 57; (2003) 6 CCLR 500.
- 74 Formerly Disability Discrimination Act 1995 s49A: see paras 9.73–9.85.
- 75 See, for example, *R v Bexley LBC ex p Jones* [1995] ELR 42 at 55.
- 76 See, for example, *R v Birmingham CC ex p Killigrew* (2000) 3 CCLR 109 and *R v Lambeth LBC ex p K* (2000) 3 CCLR 141.
- 77 See, for example, *R v Lambeth LBC ex p K* (2000) 3 CCLR 141.
- 78 *R v Islington LBC ex p Rixon* (1998) 1 CCLR 119.
- 79 *R v Ealing LBC ex p C* (2000) 3 CCLR 122.
- 80 *R (A and B, X and Y) v East Sussex CC* [2003] EWHC 167; (2003) 6 CCLR 194.
- 81 *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin); (2002) 5 CCLR 577.
- 82 See *Anufrijeva v Southwark LBC* [2004] 1 QB 1124 at [43], where the Court of Appeal stated that: 'Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue.' The authors would suggest that this will particularly be so where the family includes a disabled child.
- 83 CSDPA 1970 s28A.
- 84 *R (T, D and B) v Haringey LBC* [2005] EWHC 2235 (Admin); (2006) 9 CCLR 58.
- 85 For example: Contact a Family, *What makes my family stronger*, 2009, accessible at www.cafamily.org.uk/pdfs/wmmfs.pdf; Contact a Family, *No time for us: relationships between parents who have a disabled child – a survey of over 2,000 parents in the UK*, 2004; Mencap, *Breaking point: families still need a break*, 2006; Shared Care Network, *Still waiting*, 2006.
- 86 H M Treasury/Department for Education and Skills, *Aiming high for disabled children*, 2007.

- 87 See Department of Health LAC(93)12 – Further and Higher Education Act 1992.
- 88 *R(M) v Birmingham CC* [2009] EWHC 688 (Admin).
- 89 Formerly the Disability Discrimination Act 1995.
- 90 Social Security Contributions and Benefits Act 1992 s73(14) and see also the Local Government Ombudsman Report Case no B2004/0180 against Newport City Council, 31 August 2006.
- 91 See, for example, local government ombudsman reports on complaints 02/C/8679, 02/C/8681 and 02/C/10389 against Bolsover DC, 30 September 2003 and complaint no 05/B/00246 against Croydon LBC, 24 July 2006, para 37.
- 92 One week's holiday a year away from the home is a core criteria within the Townsend Deprivation Index – see P Townsend, P Phillimore and A Beattie, *Health and deprivation: inequality and the North*, Croom Helm, 1988.
- 93 As inserted by Adoption and Children Act 2002 s116. Guidance on the operation of this power is given in England through LAC (2003)13. See chapter 6 for further information on housing and disabled children.
- 94 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.
- 95 Which reads; 'A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare'.
- 96 Introduced by Children and Young Persons Act 2008 s25.
- 97 As at the date of writing this book (July 2010) this provision had not been brought into effect. It is understood that it should come into force in April 2011.
- 98 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322 at [95]–[96].
- 99 1991 SI No 890. Regulation 2(1)(a) states that the regulations apply to placements by a local authority of any child. In Wales, the 1991 Regulations were amended by the Arrangements for Placement of Children (General) and the Review of Children's Cases (Amendment) (Wales) Regulations 2002 SI No 3013, particularly in relation to health assessments.
- 100 SI No 959.
- 101 is derives from the fact that services provided under section 2 of the 1970 Act are technically provided in discharge of a local authorities functions under CA 1989 Part III – see para 3.31.

- 102 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887 and the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004 SI No 1748 (W185).
- 103 Department of Health, *Guidance on direct payments for community care, services for carers and children's services England*, 2009 and, in Wales, *Direct payments guidance community care, services for carers and children's services (direct payments) guidance*, 2004.
- 104 Regulation 7(1)(c).
- 105 Regulation 11 in England and regulation 7 in Wales.
- 106 Public Service Ombudsman (Wales) Complaint No B2004/0707/S/370 against Swansea City Council, 22 February 2007 – see in particular paras 78, 133 and 137.
- 107 Complaint no 08 005 202 against Kent CC, 18 May 2009 para 39 – in this case the council had refused on the grounds that it was able to provide these 'in house'.
- 108 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887 reg 13 and the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004 SI No 1748 (W185) reg 8.
- 109 Department of Health, *Guidance on direct payments for community care, services for carers and children's services England 2009*, 2009, paras 101 – 103 and *Direct payments guidance community care, services for carers and children's services (direct payments) guidance Wales*, 2004, paras 76 – 77.
- 110 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887 and the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004 SI No 1748 (W185).
- 111 Health and Social Care Act 2008 s146 and the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009: as at the date of writing this book (July 2010) s146 had not been brought into effect in Wales.
- 112 *R (A and B) v East Sussex CC No 1* [2002] EWHC 2771; (2003) 6 CCLR 177.
- 113 For further consideration of such trusts, see L Clements and P Thompson, *Community care and the law*, 4th edn, LAG, 2007, paras 12.64 – 12.70.
- 114 Sometimes referred to as 'Self Directed Support' (SDS).
- 115 See, for example, M Prabhakar, G Thom, J Hurstfield and U Parashar, *Individual*

- budgets for families with disabled children*, Research Report DCSF – RR057, DCSF, 2008.
- 116 See, for example, I Ferguson, ‘Increasing user choice or privatizing risk? The antinomies of personalization’, (2007) 37 *British Journal of Social Work*, pp387 – 403, 2007 and L Clements, ‘Individual budgets and irrational exuberance’, (2008) 11 CCLR 413 – 430.
- 117 This was found by Black J to be the case in *R (JL) v Islington LBC* [2009] EWHC 458 (Admin), where (at [39]) she observed that she found it ‘hard to see how a system such as this one, where points are attributed to a standard list of factors, leading to banded relief with a fixed upper limit, can be sufficiently sophisticated to amount to a genuine assessment of an individual child’s needs’; and see also *R (Savva) v Kensington & Chelsea RLBC* [2010] EWHC 414 (Admin); (2010) 13 CCLR 227.
- 118 See, for example, *Re North ex p Hasluck* [1895] 2 QB 264; *Charnock v Liverpool Corporation* [1968] 3 All ER 473.
- 119 Complaints nos 93/B/3111 and 94/B/3146 against South Bedfordshire DC and Bedfordshire CC.
- 120 Complaints nos 94/C/0964 and 94/C/0965 against Middlesbrough DC and Cleveland CC.
- 121 *R v Islington LBC ex p Rixon* (1997 – 98) 1 CCLR 119 at 128.
- 122 *R v Gloucestershire CC ex p Mahfood* (1997 – 98) 1 CCLR 7, DC, per McCowan LJ; and see also *R v Kirklees MBC ex p Daykin* (1997 – 98) 1 CCLR 512 at 525D.
- 123 [2003] EWHC 167 (Admin); (2003) 6 CCLR 194.
- 124 See para 2.29.
- 125 This arises if the child is in local authority care by reason of a court order or is being accommodated under CA 1989 s20, regardless of whether under subsection (1) or (4) for more than 24 hours by agreement with the parents (or with the child if aged over 16).
- 126 [2009] UKHL 26; (2009) 12 CCLR 437.
- 127 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.
- 128 Unless the child is 16 or over and agrees to be provided with accommodation under this section: CA 1989 s20(11).
- 129 *R (Liverpool CC) v Hillingdon LBC* [2009] EWCA Civ 43 per Dyson LJ at [32], approved by Baroness Hale in *R (G) v Southwark LBC* [2009] UKHL 26; (2009) 12 CCLR 437 at [28].
- 130 [2004] EWHC 1635 (Admin); (2002) 7 CCLR 589.

- 131 Cm 7137, TSO, 2007, para 2.33.
- 132 But not under CA 1989 s17.
- 133 CA 1989 s23.
- 134 Substituted, together with ss22A, 22B, 22D – 22F, for s23 as originally enacted, by Children and Young Persons Act 2008 s8(1). Parts of CA 1989 s22C as amended remain not yet in force.
- 135 CA 1989 s22C(5).
- 136 CA 1989 s22C(9).
- 137 CA 1989 s22C(8).
- 138 SI No 890.
- 139 SI No 959.
- 140 Review of Children’s Cases Regulations 1991 reg 6 (as amended by Children Act (Miscellaneous Amendments) (England) Regulations 2002 SI No 546.
- 141 CA 1989 s19B. The assessment should be completed within three months of the child reaching 16: Children (Leaving Care) (England) Regulations 2001 SI No 2874 reg 7.
- 142 [2005] EWHC 586 (Admin); (2005) 8 CCLR 255.
- 143 CA 1989 s23A.
- 144 CA 1989 s23C.
- 145 See L Clements and P Thompson, *Community Care and the Law*, 4th edn, LAG, 2007, paras 24.68 – 24.73 and chapter 10 for further information on charging.
- 146 *R (M) v Gateshead Council* [2006] EWCA Civ 221 per Dyson LJ at [42].
- 147 [2010] EWHC 978 (Fam); (2010) 13 CCLR 536.
- 148 Complaint no 07/B/07665 against Luton Borough Council, 10 September 2008.
- 149 Complaint no 07/C/03887 against Bury MBC, 14 October 2009.
- 150 HM Government, *Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children*, 2010 (*‘Working together’*).
- 151 DCSF, *Safeguarding disabled children – Practice Guidance*, 2009.

152 *Working together*, 1.31.

153 *Working together*, 6.43 – 6.48.

154 *Working together*, 6.46.

155 *Working together*, 6.45.