CHAPTER 3

Children's services

3.1 Introduction

3.6 Key changes under the Children and Families Act 2014

3.9 Statutory scheme: disabled children as 'children in need'

3.9 Overview

3.20 'Within their area'

3.22 Social work service/key workers

3.25 Key workers

3.26 Basic principles of assessment

3.27 Registers of disabled children, the 'local offer' and sufficiency of social care provision

3.30 Duty to assess

3.30 Overview

3.33 Guidance on assessment – *Working Together* (2018)

3.37 Early help

3.40 Parent carers and young carers needs assessments

3.41 Local protocols

3.43 Assessment case-law

3.47 Duty to provide services

3.47 Overview

3.51 The service provision decision

continued

36470.indb 81 19/12/2019 14:56

3.53 The use of eligibility criteria
3.62 Duty to meet 'assessed needs'
3.66 Services under the Chronically Sick and Disabled Persons Act 1970
Practical assistance in the home • Home-based short breaks • Wireless, television, library 'or similar recreational facilities' • Recreational/ educational facilities • Travel and other assistance • Home adaptations, fixtures and fittings • Holidays, meals and telephones
3.79 Services under Children Act 1989 Part III
Respite care/short breaks away from the home
3.92 Short breaks generally
3.98 Direct payments
3.100 Direct payments and respite care/short breaks
3.102 Independent user trusts
3.103 Personal budgets and personalisation
3.108 Care plans: the 'how, who, what and when'
3.108 Overview
3.118 Reassessments and reviews
3.121 Social care needs and EHC plans
3.128 Timescales for assessments and providing services
3.132 Delay and interim provision
3.134 The need for services to promote dignity
3.136 Duty to accommodate disabled children
3.145 Duties towards 'looked-after' disabled children
3.149 Support for 'accommodated children'
3.151 Duties towards disabled children 'leaving care'
3.156 Charging for children's services
3.158 Safeguarding and child protection
3.165 Transition to adult social care

Key points

- All 'disabled' children are children 'in need'. This status is not affected by the reforms introduced by Part 3 of the Children and Families Act 2014.
- The primary duty on children's services authorities is to assess the needs of children in need, including disabled children.
- Once needs have been assessed, a children's services authority has a duty to provide services to meet the assessed needs if certain conditions are met, in general terms where it is deemed 'necessary' to do so. In deciding whether it is 'necessary' to meet a child's needs, a local authority is entitled to take account of the resources available to it – but once it is accepted that it is 'necessary' to meet a particular child's needs then they must be met. At this stage, cost is only relevant to the extent that needs may be met in the most cost-effective way.
- If the outcome of the assessment is continued social care involvement, there must be a support plan setting out what services are to be delivered, and what actions undertaken, by whom and for what purpose.
- Where the criteria in Children Act 1989 s20(1) are met, disabled children must be accommodated.
- Children accommodated under Children Act 1989 s20 have additional rights while 'looked after' and on 'leaving care'.
- Decisions not to assess, provide support or accommodate disabled children can be challenged through the complaints procedure, and (where sufficiently urgent and/or important) through an application for judicial review.

Introduction

3.1 Disabled children are children first, and as such should be able to access all the services available to all children – for example nurseries, playgroups, playgrounds, leisure services, children's centres and mainstream schools. The requirements that there should be a sufficient supply of such services and that they should be accessible to all children regardless of impairment are considered at para 3.28 below and chapter 9, respectively.

3.2 This chapter is concerned with the provision of additional services to disabled children by local authority children's services departments.

These are different from those provided by the National Health Service (NHS) and are sometimes known as 'social care services'. They cover a variety of arrangements and provision aimed at helping disabled children and their families to live an ordinary life. This chapter sets out the local authority 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'. There is a specific focus on short breaks as a particularly important service for disabled children and families.[1] Disabled children's rights to health services, including NHS continuing care, are considered in chapter 5. Rights to childcare are considered in chapter 8, see paras 8.25–8.26.

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 1.48–1.52 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. 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.

3.4 In 2014/15, two government Acts of major significance to disabled people and carers came into force. The first is the Children and Families Act (CFA) 2014 which created a new system to address the educational needs and related health and care needs of disabled children and young people aged 0–25. The second is the Care Act 2014, which although primarily an Act concerning disabled adults and their carers, also contains important provisions on transition to adulthood.

3.5 Both Acts have the potential to improve services and support for disabled children, young people and their families. However, the

1 Short breaks are 'part of a continuum of services which support children in need and their families. They include the provision of day, evening, overnight and weekend activities for the child or young person, and can take place in the child's own home, the home of an approved carer, or in a residential or community setting'. See Department for Children, Schools and Families, *Short Breaks: Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks*, April 2010, para 2.1.

legislative reform in 2014/15 did not create a coherent scheme in relation to disabled children's social care. The key elements of this scheme remain the Children Act 1989 and the Chronically Sick and Disabled Persons Act (CSDPA) 1970.

Key changes under the Children and Families Act 2014

3.6 The key provisions of the CFA 2014 and its Code of Practice[2] for disabled children's social care are addressed throughout this chapter.[3] In summary, they include:

- The replacement of 'statements of special educational needs' by Education, Health and Care (EHC) plans (see paras 3.121–3.127).[4]
- The duty on local authorities to have in place a 'local offer', setting out the provision (including care provision) which is expected to be available both within and outside the local authority's area at the time of its publication (see para 1.53 and para 3.28).
- The duty on local authorities to keep social care provision made inside and outside their area under review and to consider its sufficiency (see para 3.28).[5]
- The duties in relation to integration and joint commissioning with the NHS (see para 3.24).[6]
- The duty to provide children, young people and parents with 'advice and information about matters relating to the disabilities of the children or young people concerned'.[7]

2 Department for Education and Department of Health, *Special Educational Needs and Disability Code of Practice: 0 to 25 years*, January 2015 ('the SEND Code').

3 For further information see Council for Disabled Children, *The role of social care in implementing the Children and Families Act 2014*, 26 March 2015.

4 EHC plans differ from statements by containing details of a child/young person's health and social care needs as well as their special educational needs. They also have the potential to continue until the age of 25.

5 CFA 2014 s27(1). The SEND Code states at para 4.20 that: 'Local authorities should link reviews of education, health and social care provision to the development and review of their local offer and the action they intend to take in response to comments'.

6 See the SEND Code at chapter 3. These build on the co-operation duties imposed by Children Act 2004 ss10–11, see chapter 2 at paras 2.52–2.55.

7 CFA 2014 s32(2).

3.7 Although these are important developments, they do not affect the fundamental aspects of the statutory scheme for disabled children's social care. For example, unlike in relation to education and health services[8], there is no new duty to provide social care services in the CFA 2014. Neither the CFA 2014 nor the Care Act 2014 remove any social care rights that existed before their implementation (indeed both make material improvements). In relation to the social care rights of disabled children, however, the main contribution made by both Acts is to improve the co-ordination of social care support with education and health services rather than creating any new entitlements.

3.8 A further development under the CFA 2014 with potentially far-reaching implications (including for social care) is the duty imposed by section 19. This requires local authorities to 'have regard' to (ie consider) a series of matters, most notably 'the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the *best possible educational and other outcomes*'[9] (emphasis added). This strongly suggests that it will no longer be acceptable for a local authority to simply aim for 'sufficient' or 'adequate' provision (including social care provision) for a child or young person.[10]

Statutory scheme: disabled children as 'children in need'

Overview

3.9 The law and procedures related to the provision of social care services for disabled children and their families is complex and is covered in detail below. An overview of the assessment and care provision duties of local authorities is provided overleaf to help explain the process.

3.10 Both for disabled children who have an EHC plan (see paras 3.121–3.127 below) and those who do not, the key legislation govern-

8 See CFA 2014 s 42.

9 CFA 2014 s19(d).

10 However, the section 19 duty is only engaged when a local authority is exercising a function under CFA 2014 Pt 3. This may, therefore, lead to disputes in individual cases – for example, it may be said that a stand-alone assessment under Children Act 1989 s17 does not engage the section 19 duty, whereas a social care assessment undertaken as part of an EHC assessment process plainly must. See further the discussion of the case-law to day on the section 19 duty in chapter 4 at para 4.25.

ing the provision of additional services to disabled children is the Children Act 1989 and the CSDPA 1970. The Children Act 1989 establishes the assessment duty (see paras 3.30–3.46 below) which is generally crucial as the gateway to services and support. The Children Act 1989 also requires the provision of certain specific services, particularly residential and foster care short breaks.

3.11 Assessments made under the Children Act 1989 should also determine whether a child is eligible for support under the CSDPA 1970 (see paras 3.62–3.78 below).[11] As the 2018 statutory guidance[12] explains:

> When undertaking an assessment of a disabled child, the local authority must also consider whether it is necessary to provide support under section 2 of the Chronically Sick and Disabled Persons Act (CSDPA) 1970. Where a local authority is satisfied that the identified services and assistance can be provided under section 2 of the CSDPA, and it is necessary in order to meet a disabled child's needs, it must arrange to provide that support.

3.12 Section 17(1) of the Children Act 1989 places a duty on local authorities to safeguard and promote the welfare of children within their area who are 'in need'. The 'primary objective' of Children Act 1989 s17 is to 'to promote the welfare of the children concerned, including the upbringing of such children by their families'.[13] Section 17 is 'a development of a duty dating back to the Children and Young Persons Act 1963 to provide families with help in order to avoid the need for children to be taken into care or looked after by the local authority'.[14] As such, so far as is consistent with the duty to safeguard and promote the welfare of children, local authorities must promote the upbringing of such children by their families.[15] Local authorities are empowered to provide 'a range and level of services' to meet the needs of 'children in need'. The work of authorities under Children Act 1989 Part III should be directed at (among other things) providing effective family support.[16]

3.13 The definition of 'children in need' is to be found at Children Act 1989 s17(10), which provides that a child is to be taken as 'in need' if:

11 As specifically provided for by Children Act 1989 Sch 2 para 3(a).

12 HM Government, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, July 2018, p22, para 28.

13 *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73; (2018) 21 CCLR 127 at [37] per Lord Carnwath.

14 *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73; (2018) 21 CCLR 127 at [42] per Lady Hale.

15 Children Act 1989 s17(1)(b).

16 Children Act 1989 Sch 2 para 7(a)(i).

(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*. (emphasis added).

3.14 It is important to note that unlike other categories of children 'in need', there is no additional requirement for 'disabled' children to require support from the local authority to meet this definition. If a child is 'disabled', he or she is automatically a child 'in need'. At section 17(11), the definition of 'disabled' for the purposes of Children Act 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.

3.15 The definition is outdated and excessively medical in its approach. It does, however, have 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 Mental Health Act 1983 s1(2), which defines 'mental disorder' as including 'any disorder or disability of the mind'. Additionally, a mental disorder will generally amount to a disability within the definition in Equality Act 2010 s6 and, accordingly, any difference in treatment of such persons will be liable to challenge, as unlawful, disability discrimination.[17]

3.16 If it is not accepted that a child is 'disabled', a child may still be a 'child in need' by virtue of requiring services for the reasons specified in Children Act s17(10)(a) or (b). This alternative route to entitlement will also be relevant to siblings of disabled children, who may be 'in need' as a result of the impact on them of living in a family coping with disability. If so, services can be provided for the sibling directly (subsequent to their own assessment) as well as following the assessment of the disabled child under Children Act 1989 s17(3), which

17 See, for example, *Governing Body of X School v S P and others* [2008] EWHC 389 (Admin) and see also chapter 9 below regarding the definitions of 'disability' and 'discrimination' under the Equality Act 2010.

allows services to be provided to any family member of a child 'in need'. For the rights of siblings of disabled children who are 'young carers', see chapter 8 on carers at paras 8.27–8.60.

3.17 It should be borne in mind that there is a low threshold for social care assessments,[18] 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'). Although it will not necessarily be unlawful for a local authority to prioritise the speed with which it undertook certain assessments (for example, on the basis of urgency), it would be unlawful for a local authority to have 'eligibility criteria' for assessments, see para 3.53.

3.18 While many children will have had a medical diagnosis of an impairment or condition prior to a local authority assessment taking place, legally, this is not a requirement.

3.19 The latest statistics (for 2017/18) suggest that about 12.3 per cent of all children recognised by local authorities to be 'in need' have disability or illness as their primary need.[19]

'Within their area'

3.20 The duty in Children Act 1989 s17(1) is owed to children who are 'within the area' of a particular local authority. This does not mean that a child has to be 'ordinarily resident' in that local authority – the ordinary residence provisions of the Care Act 2014 do not apply to the Children Act 1989. In particular, it is possible (and indeed, in London likely) that a child can be within the area of more than one authority. An example of this is found in *R v Wandsworth LBC ex p Stewart*[20] where the children were held to be 'within the area' of both Lambeth (where they were living) and Wandsworth (where they went to school). As such, 'physical presence is both necessary and of itself sufficient to establish that a child is within a local authority's area'.[21] What is plainly needed is for the authorities to co-operate in cases

18 By analogy, see *R v Bristol CC ex p Penfold* (1997–98) 1 CCLR 315 which concerned a very similar obligation in the NHS and Community Care Act 1990 s47.

19 Department for Education, *Statistical First Release: Characteristics of children in need in England, 2017–2018*, 7 December 2018, p5. This found that there was a total of 404,710 children assessed as 'in need' in England in 2017–2018 – which would indicate that about 50,000 of these were disabled children. Given that there are about 800,000 disabled children in England, this would suggest that the vast majority of disabled children go unrecognised as children 'in need'.

20 [2001] EWHC 709 (Admin); [2002] 1 FLR 469.

21 *R (BC) v Birmingham CC* [2016] EWHC 3156 (Admin) at [46].

like this to make sure that one authority takes the lead, typically the authority where the child lives; this is supported by the co-operation duty in Children Act 1989 s27.[22]

3.21 If a child in need is placed in accommodation outside his or her home area, the child remains the responsibility of the placing authority for the duration of that placement: Children Act 1989 s105(6). The implications of this for the responsibility to provide adult care services have been addressed by the Supreme Court.[23] However, if a child in need leaves a local authority's area voluntarily (for example, because the child is part of a travelling family) then the authority continues to have the power to provide the child with services outside the area.[24]

Social work service/key workers

3.22 Local authorities in England must appoint a director of children's services[25] whose functions include children's social services functions. As a matter of public law, it is a requirement that directors are provided with sufficient staff in order to discharge their functions.[26] Where harm results from delay caused by staff shortages, it will constitute maladministration.[27]

3.23 A duty exists on the Lead Member for Children[28] and the director of children's services to 'cooperate with those leading the integration arrangements for children and young people with SEN [special educational needs] or disabilities to ensure the delivery of care and support is effectively integrated in the new SEN system'.[29]

22 The High Court in *Ex p Stewart* stated (at [28]) that in these cases where children are within the area of more than one authority 'there is a manifest case for co-operation under section 27 of the Children Act and a sharing of the burden by the authorities'.

23 In *R (Cornwall Council) v Secretary of State for Health and another* [2015] UKSC 46; [2015] 3 WLR 213.

24 *R (J) v Worcestershire CC* [2014] EWCA Civ 1518; [2015] 1 WLR 2825.

25 Children Act 2004 s18.

26 Local Authority Social Services Act 1970 s6(6) makes this obligation explicit in relation to directors of adult services – requiring that they secure the provision of 'adequate staff' for assisting them in the exercise of their functions.

27 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).

28 The council's elected cabinet member with responsibility for children's services.

29 SEND Code, para 3.70.

3.24 The CFA 2014 requires that local authorities exercise their functions with a view to ensuring the integration of educational provision and training provision with health care provision and social care provision.[30] Authorities must also make joint commissioning arrangements[31] with 'partner commissioning bodies'[32] about the education, health and care provision to be secured for children and young people with SEN and disabled children and young people.[33]

Key workers

3.25 Given the difficulties that parents and children have in obtaining information and accessing fragmented and unco-ordinated 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.[34] The *Special educational needs and disability code of practice: 0 to 25 years* ('SEND Code') states that:

> Local authorities should adopt a key working approach, which provides children, young people and parents with a single point of

30 CFA 2014 s25.

31 The SEND Code states at para 3.9 that:

> Joint commissioning arrangements must cover the services for 0–25 year old children and young people with SEN or disabilities, both with and without EHC plans. Services will include specialist support and therapies, such as clinical treatments and delivery of medications, speech and language therapy, assistive technology, personal care (or access to it), Child and Adolescent Mental Health Services (CAMHS) support, occupational therapy, habilitation training, physiotherapy, a range of nursing support, specialist equipment, wheelchairs and continence supplies and also emergency provision.

Joint commissioning arrangements must also include arrangements for securing the education, health and care provision specified in EHC plans: SEND Code, para 3.11.

32 Being the NHS Commissioning Board ('NHS England') and each clinical commissioning group (CCG) for the area: CFA 2014 s26(8).

33 CFA 2014 s26.

34 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.

contact to help ensure the holistic provision and coordination of services and support.[35]

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,[36] research over subsequent decades has highlighted how variable and limited developments have been in this respect.[37] 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 practitioner.[38]

Basic principles of assessment

3.26 In the following paragraphs, we detail the legal duties of local authorities in relation to assessment by reference to the 2018 statutory guidance, *Working Together to Safeguard Children*[39] ('*Working Together*'). The guidance (as we note below) has significant limitations and must be seen in the context of the wider set of public law principles that

35 SEND Code, para 2.21.

36 Court Report, *Fit for the future: report of the committee on child health services*, Cmnd 6684, HMSO, 1976.

37 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.

38 See HM Government, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, July 2018, p15, para 8. See para 2.41 for discussion of the status of this guidance.

39 HM Government, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, July 2018.

underpin all assessments of disabled children and their families.[40] These include the requirements that:

- 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.[41]
- 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.[42]
- 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 live a more ordinary life. All involved then agree on the provision that could make those outcomes happen.[43] 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.

40 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.

41 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.

42 Department of Health, *Carers and Disabled Children Act: practice guidance*, TSO, 2001.

43 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.

- Early intervention is regarded as important in order to avoid families reaching crisis point.[44]
- 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.

Registers of disabled children, the 'local offer' and sufficiency of social care provision

3.27 The Children Act 1989[45] requires that local authorities maintain a register of disabled children within their area. There would appear to be considerable potential for such a database to be used dynamically to provide both targeted information for families and as a strategic resource (linked – for example, into the assessments concerning the extent to which there are young carers/parent carers within their area[46] as well as the sufficiency of childcare facilities suitable for disabled children[47]). Registration of a child's name on such a register is entirely voluntary.

3.28 CFA 2014 s27 additionally requires that local authorities assess and keep under review the sufficiency of social care provision (and educational/ training provision – see para 4.30) in their area for disabled children and consider the sufficiency of this provision. Compliance with this and the other strategic duties will require local authorities to know their population of disabled children and young people, understand their social care needs and assess whether the level of social care services available is sufficient to meet those needs. Information as to social care services inside and outside the local authority's area is required to be published as part of the 'local offer' (see para 3.27 above).[48] In *R (L and P) v Warwickshire CC*,[49] the court

44 HM Treasury and Department for Education and Skills, *Aiming high for disabled children: better support for families*, 2007.

45 Schedule 2 Part 1 para 2; regulatory powers under the Children Act 2004 s17 enabling the extension of this duty to encompass 'Children and Young People's Plans' appear to have been abandoned with the revocation of the regulations under that section.

46 Ie Children Act 1989 s17ZA and s17ZD, respectively; and see also paras 8.5 and 8.31 below.

47 Childcare Act 2006 s6(2)(a)(ii).

48 See CFA 2014 s30 and SEND Regs 2014 Sch 2 para 13. See further para 4.41–4.47.

49 [2015] EWHC 203 (Admin); (2015) 18 CCLR 458.

held that, in breach of its statutory duty, the authority had failed to maintain a disability register, noting that:

> . . . unless this local authority has such a register and knows more or less precisely how many disabled children there are in the county it cannot make a fully informed decision about budgetary allocation or as to the terms of a proposed Local Offer.[50]

3.29 Even where registers are well-maintained, the fact that registration is voluntary means that they are not guaranteed to be a reliable source of information on the population of disabled children in a local area. Local authorities will need, therefore, to draw on other data.[51]

Duty to assess

Overview

3.30 The Children Act 1989 contains no explicit duty on children's services authorities to assess the needs of disabled children and their families.[52] However, in *R (G) v Barnet LBC and others*,[53] the House of Lords held that such an obligation to assess under the Children Act 1989[54] had to be inferred to exist.[55] In *R (AC and SH) v Lambeth*

50 [2015] EWHC 203 (Admin); [2015] ELR 271 at [83].

51 See, for example, Department for Work and Pensions, *Making disability data work for you*, 2014.

52 There has for some time been an express duty to assess in the primary legislation for adult social care: see NHS and Community Care Act 1990 s47 and now Care Act 2014 s9.

53 [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 Children Act 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'.

54 The issue in *R (G) v Barnet LBC* was whether Children Act 1989 s17 created a specific duty to provide services, in particular accommodation. Lord Nicholls, who was in the minority, 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 Children Act 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 (then) Education Act 1996 Part IV (a special educational needs assessment, now replaced by an education, health and care assessment).

55 The ombudsman has also identified a public law duty to assess under the Children Act 1989 – see, for example, Complaint no 12 015 730 against Cambridgeshire CC, 12 November 2013, in particular para 44.

LBC,[56] the court held that although 'the status of being 'in need' under the broad definition of 'disabled' under Children Act 1989 s17 does not of itself give rise to an obligation to provide section l7 support it does require the defendant to make a rational decision as to what, if any, support is necessary and appropriate to meet the child's needs'. Plainly such a 'rational decision' can only be taken subsequent to an assessment of the child's needs.

3.31 As noted at para 4.84 below, where a local authority is under a duty to undertake an 'EHC assessment', this will include a specific duty to assess their social care support needs.[57]

3.32 Where a local authority carries out an EHC assessment, it must seek advice, which must include 'advice and information in relation to social care'.[58] In the opinion of the authors of this book, it will not be sufficient for children's services to discharge the advice-giving duty in relation to an EHC assessment by simply stating that a child is 'not known' to social care. The request for advice must constitute a referral for the purposes of Children Act 1989 s17 and so the proper response where a child is not previously known to social care will be to carry out an assessment in accordance with the *Working Together* guidance (see paras 3.33–3.36 below) so that there can be meaningful input to the EHC assessment process. Where a new or revised social care assessment is necessary, this should be carried out alongside the overall EHC assessment process. The SEND Code calls for a 'tell us once' approach[59] and emphasises the need for co-ordinated assessment processes.[60] The SEND Code states further that 'EHC needs assessments should be combined with social care assessments under Section 17 of the Children Act 1989 where appropriate'.[61]

56 [2017] EWHC 1796 (Admin); (2018) 21 CCLR 76 at [65]. In that case, the local authority had failed to carry out a child in need assessment of an autistic child, and had not determined whether if services, including accommodation, were not provided to the child he would be unlikely to achieve or maintain a reasonable standard of health and development or whether in that situation his health or development would be likely to be significantly impaired.

57 CFA 2014 s36 and SEND Regs 2014 regs 3–10. The duty only arises where the authority is of the opinion that: a) the child or young person has or may have SEN; and b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

58 SEND Regs 2014 reg 6(1)(e).

59 SEND Code, para 9.33.

60 SEND Code, paras 9.30–9.31.

61 SEND Code, para 10.18.

Guidance on assessment – *Working Together* (2018)

3.33 The principal guidance on the duty to assess the needs of children who are or may be 'in need' is found in a 2018 policy document, *Working Together*.[62] The guidance is problematic in that it is primarily concerned with the duties to safeguard children from abuse and neglect and provides only limited practical advice concerning the provision of support to disabled children and their families. The perception that *Working Together* is directed at children subject to abuse or neglect (and not the needs of disabled children and their families for support) is reinforced by its requirement[63] that local safeguarding partners publish a 'threshold document' setting out (amongst other things) the 'criteria, including the level of need, for when a case should be referred to local authority children's social care for assessment and for statutory services under Children Act 1989 s17 (children in need)'. However, the statutory duty to disabled children as children 'in need' is clear and *Working Together* can be read in a way which supports the positive implementation of this duty (especially if applied sensitively by professionals who have the necessary expertise) in cases where there are no concerns about the child's parenting.

3.34 The purpose of assessment is said by *Working Together* 'always' to be to gather important information about a child and family, analyse their needs, decide whether the child is a child in need and provide support to address those needs to improve the child's outcomes.[64] Moreover, '[e]very assessment should be focused on outcomes, deciding which services and support to provide to deliver improved welfare for the child'.[65] Key features of the guidance on assessment include:

- The requirement that assessment may be carried out by a social worker and 'specialist assessments may be required'.[66]

62 HM Government, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, July 2018, issued under statutory provisions including section 7 of the Local Authority Social Services Act 1970, which requires authorities to 'act under' such guidance.

63 *Working Together*, p16, para 16.

64 *Working Together*, p24, para 38.

65 *Working Together*, p30, para 63.

66 *Working Together*, p21.

- The requirement for a 'timely' assessment, and the specific obligation for a decision to be made about the type of response required within *one working day* of a referral being received.[67]
- The imposition of a maximum timeframe for assessments to conclude[68] of *45 working days* from the point of referral: the presumption being that a single assessment will take place within this timeframe which is proportionate to the needs of the individual child. Importantly, the guidance states that:

  > Whatever the timescale for assessment, where particular needs are identified at any stage of the assessment, social workers should not wait until the assessment reaches a conclusion before commissioning services to support the child and their family.[69]

- Every assessment must be informed by the views of the child as well as the family, and children should, wherever possible, be seen alone.[70] Assessments of disabled children may, therefore, require more preparation, more time and potentially specialist expertise in communication.[71] This obligation to engage with the child in the assessment process is reinforced by Children Act 1989 s17(4A),[72] 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.[73] 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.[74] See para 1.22 for more on the fundamental

67 *Working Together*, p31, para 71. A point endorsed by the SEND Code (para 9.35) that: 'For social care, help and support should be given to the child and family as soon as a need is identified and not wait until the completion of an EHC needs assessment'.

68 Defined as the point where 'it is possible to reach a decision on next steps': *Working Together*, p32, para 75.

69 *Working Together*, p32, para 76.

70 *Working Together*, p21. See also p16, para 14: 'Anyone working with children should see and speak to the child; listen to what they say; take their views seriously; and work with them and their families collaboratively when deciding how to support their needs'.

71 Department of Health, *Framework for the assessment of children in need and their families practice guidance*, 2000, para 3.128

72 As inserted by Children Act 2004 s53.

73 In this respect, the statutory scheme reflects the requirements of UNCRC Article 12.

74 *R (A and B) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin); (2003) 6 CCLR 194.

duty to consult with disabled children on decisions about their lives.

3.35 *Working Together* stresses[75] that a 'good assessment' is one which investigates three 'domains':

1) the child's developmental needs;
2) parenting capacity; and
3) 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).

Assessments should be holistic; as *Working Together* states:[76] 'Every assessment should reflect the unique characteristics of the child within their family and community context'.

3.36 The minimum standards detailed in *Working Together* must be followed (since it is statutory guidance) in the absence of cogent reasons – and even in such cases, the scope for departure is severely limited.[77] *Working Together* states that: 'This document should be complied with unless exceptional circumstances arise'.[78] What is important is that the assessment 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 para 3.62 below on the duty to provide services to meet assessed needs).

Early help

3.37 In recent years, a number of good practice guidance documents have encouraged local authorities to move away from detailed assessments of 'children in need' towards a more flexible approach, often

75 *Working Together*, p27, para 52.

76 *Working Together*, p28, para 53.

77 See, for example, *R (TG) v Lambeth LBC* [2011] EWCA Civ 526; (2011) 14 CCLR 366 at [17] and *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119 at 123, 15 March 1996, QBD. These cases are considered at paras 2.41–2.42 above.

78 *Working Together*, p7, para 6.

using what has been termed the 'Common Assessment Framework' (CAF) – sometimes referred to as a type of 'Early Help' assessment.[79] Such simplified/streamlined assessment programmes appear to have a number of benefits,[80] including their potential to 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 *Working Together*. 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.

3.38 *Working Together* formalises the concept of an 'Early Help' assessment. This should be undertaken by a lead practitioner (eg a general practitioner (GP), a family support worker, school nurse, health visitor or special educational needs coordinator) who should 'provide help to the child or family, act as an advocate on their behalf and co-ordinate the delivery of support services'.[81] Although *Working Together* refers to a child who is 'disabled and has specific additional needs' as an example of a child who may benefit from 'Early Help',[82] this section of the guidance is aimed at 'all practitioners, including those in universal services'.[83] *Working Together* is clear that if a 'disabled' child (or any other child who may be 'in need') is identified, 'a referral should be made immediately to local authority children's social care'.[84] The guidance, therefore, suggests that 'Early Help' is a low level approach different from the duty to assess children 'in need' which falls on local authority children's services departments. Indeed,

79 *Working Together*, p14, para 7.

80 Department for Children, Schools and Families, *Early Support*, 2004 – 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 Bonnick, 'Framework for optimism', (2010) *Community Care* 8, p8.

81 *Working Together*, p15, para 8. It is plain from p12 of the guidance that the 'Early Help' approach is intended to reflect the general duty on local authorities and other relevant bodies to co-operate in order to improve the well-being of children found in Children Act 2004 s10.

82 *Working Together*, p14, para 6.

83 *Working Together,* p13, para 4.

84 *Working Together*, p15, para 10.

Working Together refers to 'Early Help' in the context of the general co-operation duty in Children Act 2004 s10, see para 2.53 above.

3.39 The scope of the duty to assess disabled children as children 'in need' was, however, considered by the High Court in *R (L and P) v Warwickshire CC*[85] where the court considered that 'the guidance should not be read as insisting that every disabled child should initially be the subject of a full-blown social worker assessment'. In the court's opinion, the legislative scheme did not require that every child with a 'mental disorder' should be entitled automatically to receive a Children Act 1989 s17 assessment conducted by a social worker. In the judge's view, there was nothing wrong with the local authority's approach that disabled children with lower level needs could be assessed under the CAF. This leaves open the question of the threshold at which a local authority must offer a social work assessment rather than an 'Early Help' assessment. There has been no further consideration of the requirements for social care assessments by the courts since *L and P v Warwickshire CC*.

Parent carers and young carers needs assessments

3.40 The Children Act 1989 (as amended by the CFA 2014) places specific and significant duties on local authorities to assess the needs of carers with parental responsibility for disabled children as well as young carers and these duties are considered in chapter 8. These assessments must inform the decision on the package of support to be provided to the family under Children Act 1989 s17 – see s17ZF.

Local protocols

3.41 *Working Together* also requires the publication by local authorities and their partners of 'local protocols for assessment'.[86] The protocol must be consistent with the statutory guidance and set out clear arrangements for the management of cases after referral to the children's services department. In particular, the protocol for each authority should (among other things):

- reflect where assessments for some children will require particular care (eg young carers, children with SEN, children with specific communication needs);

85 [2015] EWHC 203 (Admin); (2015) 18 CCLR 458, see [72].

86 *Working Together*, p24, paras 39–43.

- set out clear procedures for how different organisations and agencies will communicate with the child and family so that the child does not become lost between the different organisational procedures;
- clarify how different organisations and agencies and practitioners undertaking assessments and providing services can make contributions; and
- set out the process for challenge by children and families by publishing the complaints procedures.[87]

3.42 The local protocol is, therefore, an essential document for all those concerned with how assessment should operate in any particular local area. There is an express requirement in *Working Together* for local authorities to publish the local protocol[88] and, given the overarching theme of transparency,[89] it should be expected that the protocol is easily available, including on the authority's website and as part of the 'local offer' website (see para 3.28 above). *Working Together* states clearly that the 'local authority is publicly accountable for this protocol'.[90]

Assessment case-law

3.43 The duty to assess under Children Act 1989 s17 has been the subject of significant litigation, which has reinforced its nature as being 'substance' rather than 'form'. Although these cases were decided by reference to guidance that predated the 2018 *Working Together* guidance (and its 2015 predecessor), the principles they establish would appear to be of continued and direct relevance.

3.44 In *R (AB and SB) v Nottingham CC*,[91] it was held that a failure by an authority to have in place a 'systematic approach' for conducting a

87 All from *Working Together*, pP25–26, paras 41–43.

88 *Working Together,* p24, para 39.

89 See, for example, the SEND Code at para 11.1:

> Relations between education, health and social care services and parents and young people should be marked by open communication so that parents and young people know where they are in the decision-making process, their knowledge and experience can be used to support good decision-making and they know the reasons why decisions have been made.

90 *Working Together,* p25, para 40.

91 [2001] EWHC 235 (Admin); (2001) 4 CCLR 294 at 306G–I.

core assessment[92] was an 'impermissible departure from the guidance'. In the court's opinion it was essential that the result of such an assessment must be that individuals could see 'what help and support the child and family need and which agencies might be best placed to give that help'.

3.45 Assessments must also identify and address foreseeable future needs as well as present needs: *R (K) v Manchester CC*.[93]

3.46 A failure to carry out a lawful assessment according to the guidance may result in the court requiring that a new assessment be undertaken.[94] 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*[95] 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.

Duty to provide services

Overview

3.47 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 question, particularly by reference to the duty in CSPDA 1970 s2 (see paras 3.66 below).

3.48 In relation to the general expectation that assessed needs will be met, the general duty (see para 2.48 for the meaning of this term) on local 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'.[96] Furthermore, the clear expectation of *Working Together* is that an assessment which

92 The previous guidance distinguished between 'initial' and 'core' assessments, a distinction abandoned under *Working Together*.

93 [2006] EWHC 3164; (2007) 10 CCLR 87.

94 *R (G) v Barnet LBC* [2003] UKHL 57; (2003) 6 CCLR 500 per Lord Nicholls at [32].

95 [2005] EWHC 586 (Admin); (2005) 8 CCLR 255. This case is discussed in detail at para 3.112.

96 Children Act 1989 s17(1) and Sch 2 para 6.

identifies significant needs will generally lead to the provision of services. This is demonstrated by the definition of the purpose of assessment which includes 'to provide support to address those needs to improve the child's outcomes and welfare and where necessary to make them safe'.[97] Further, the guidance states that: 'Every assessment should be focused on outcomes, deciding which services and support to provide to deliver improved welfare for the child'.[98] These principles are particularly important in cases concerning families with disabled children who may not be eligible for 'mainstream' social welfare benefits and services by reason of their immigration status.[99] In these cases the services required, including accommodation, may go beyond those which a local authority may be obliged to provide under CSDPA 1970 s2 (see para 3.66 below).

3.49 The duties under Children Act 1989 s17 are reinforced by the general duty to safeguard and promote the welfare of all children in the authority's area under Children Act 2004 s11. This in turn reflects the obligation imposed by Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) that the best interest of children should be treated as a primary consideration in all actions and decisions which affect them.[100] They are also reinforced by CSDPA 1970 s2, considered throughout the following section of this chapter.

3.50 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 such as by 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. The decision

97 *Working Together,* p24, para 38.

98 *Working Together,* p30, para 63.

99 See, for example, *R (AC and SH) v Lambeth LBC* [2017] EWHC 1796 (Admin); (2018) 21 CCLR 76, where a local authority's decision not to treat an autistic child as a child in need was quashed and the authority was ordered to continue to accommodate and support the family while a fresh assessment was undertaken.

100 See *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 at [23], where Baroness Hale held that Children Act 2004 s11 and similar statutory provisions translated 'the spirit, if not the precise language' of the obligation imposed by UNCRC Article 3 into domestic law. See further paras 2.25 and 2.54 above.

on the particular service or type of service to offer must be informed by consideration of the assessed needs of the particular child and family.

The service provision decision

3.51 As we have seen above, while local authorities are obliged to assess disabled children in accordance with the requirements of *Working Together*, 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 Children Act 1989 s17, services are required to safeguard or promote the welfare of the child).[101] The duty under CSDPA 1970 s2 is of particular importance because the courts have held that an individual child has no right to a service under Children Act 1989 s17.[102]

3.52 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

3.53 Sadly these two distinct processes (the service provision decision and the consequences of the decision) are sometimes confused. The confusion relates to the notion of 'eligibility criteria', ie criteria which are used to determine eligibility – the confusion relates to the question: 'eligibility for what?'

3.54 As we have seen above, local authorities are under a statutory duty to assess the needs of each child 'in need'.[103] Accordingly, it would be

101 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.

102 See *R (VC) v Newcastle CC* [2011] EWHC 2673 (Admin); (2012) 15 CCLR 194 at [21]–[27].

103 The High Court in *R (L and P) v Warwickshire CC* [2015] EWHC 203 (Admin): (2015) 18 CCLR 458 held that there was no duty to carry out a social work assessment of every disabled children, as some disabled children could be assessed simply via a CAF assessment or another form of 'Early Help' assessment; see para 3.37 above.

unlawful for a local authority to impose its own 'eligibility criteria' to decide which children to assess. This would constitute an extra-statutory hurdle for a child to cross.

3.55 However, once a child has been assessed, the law does not require that services be provided in every case. Various statutory provisions require social services/children's services departments to provide support for disabled children. The most important of these comprise Children Act 1989 and CSDPA 1970 s2. However, other provisions do exist and one of these, Mental Health Act 1983 s117, is considered briefly at para 5.136.

3.56 The general duty[104] to provide support services under Children Act 1989 Part III is triggered by the authority 'determining' (section 17(4A)) that the provision of services is 'appropriate' (section 17(1)). The specifically enforceable duty[105] under CSDPA 1970 s2 (see para 3.66) is triggered by the authority being 'satisfied' the services are 'necessary'.[106] Arguably there is very little, if any, difference between these two tests. In practice, a local authority could (and perhaps 'should')[107] decide that it will only 'determine' that the provision of services is 'appropriate' under Children Act 1989 Part III when it is satisfied these are necessary (ie the test for accessing support under the CSDPA 1970). If this is right, then the same decision must effectively be made regardless of the Act under which the decision is being taken.

3.57 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.[108]

3.58 Such criteria must, however, promote the objects of the legislation,[109] ie that so far as possible, disabled children be brought up by

104 See para 2.48 for an explanation as to the nature of a 'general' or 'target' duty.

105 See para 2.47 for an explanation as to the nature of a 'specifically enforceable' duty.

106 *R v Gloucestershire CC ex p Barry* [1997] AC 584; (1997–98) 1 CCLR 40.

107 Not least, because Children Act 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 Children Act 1989.

108 *R v Gloucestershire CC ex p Barry* [1997] AC 584; (1997–98) 1 CCLR 40, and in the disabled children's context *R (JL) v Islington LBC* [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.

109 See discussion of the *Padfield* principle in chapter 2 at para 2.8.

their families[110] 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'.[111] 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.[112] While the use of such criteria is well developed in relation to adult care law,[113] this is not so for children's services. In *R (JL) v Islington LBC,*[114] 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;[115] however, to date no such guidance has been issued in relation to disabled children's social care. As Clements and Thompson observed, 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 Children Act 1989 Part III (provision of services for children and their families) but for Part VI (child protection).[116]

3.59 It is permissible, therefore, for children's services authorities to operate eligibility criteria to limit access to services. However, the principles of public law demand that there must be a rational process for deciding which children are eligible for services and which are not. Eligibility criteria must therefore:

110 Children Act 1989 s17(1)(b).

111 Children Act 1989 Sch 2 para 6.

112 In this context see also L Clements and P Thompson, *Community care and the law,* 5th edn, LAG, 2011, paras 23.38–23.41.

113 See, for example, the Care and Support (Eligibility Criteria) Regulations 2015 SI No 313.

114 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.

115 There has been no statutory guidance on eligibility criteria for disabled children's services since the *Islington* judgment. However, there has been non-statutory advice given to local authorities on the application of eligibility criteria in the context of short breaks, see para 3.92 below.

116 L Clements and P Thompson, *Community care and the law,* 5th edn, LAG, 2011 at para 23.39.

- be transparent because of the policy expectation – see, for example, the 'local offer' created by CFA 2014 s30 – and the need to comply with public law duties[117] and an authority's obligations under the European Convention on Human Rights (ECHR) Article 8 (right to respect for one's private life); every 'local offer' must include information as to any eligibility criteria governing access to social care services for disabled children and young people;[118]
- 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;
- take account of the object and purpose of Part III of the Children Act 1989,[119] being that 'local authorities should provide support for children and families',[120] and not be set at the same level as the child protection threshold (see further para 3.158 below); and
- have been the subject of consultation[121] which has taken into account (among other things) the relevant equality duties, particularly the duty under Equality Act 2010 s149 (see para 9.99).

3.60 The human rights obligations on public bodies (particularly ECHR Article 8: see para 2.14) additionally require that any criteria they operate must not be so strict as to deny support where there is a real risk of significant harm[122] to the child or family if support is not

117 For example, the duty in the Breaks for Carers of Disabled Children Regulations 2011 SI No 707 reg 5, which requires a local authority's 'short breaks services statement' to include 'any criteria by which eligibility for [short breaks] will be assessed'.

118 See SEND Regs 2014 Sch 2 para 18. 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.

119 See para 2.8 for discussion of this principle, referred to as the *Padfield* principle.

120 *R (M) v Gateshead MBC* [2006] EWCA Civ 221 per Dyson LJ at [42].

121 Whether required by statute, see for example the Breaks for Carers of Disabled Children Regulations 2011 SI No 707 reg 5(4), requiring regard to the views of parent carers before a 'short breaks services statement' is prepared or revised, or (almost certainly) under the common law, on which see para 2.9.

122 'Significant harm' is not defined in the Children Act 1989, but does not include 'minor shortcomings' or 'minor defects' in care being provided; Department of Health, *The Children Act 1989 Guidance and Regulations. Volume 1: Court Orders* (1991), para 3.12. See R White, AP 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.

provided (being harm that is more than minor or trivial).[123] In setting criteria, local authorities are obliged to treat the best interests of disabled children as a primary consideration, this obligation being imposed by UNCRC Article 3 read with ECHR Article 8, Children Act 1989 s17 and Children Act 2004 s11.[124]

3.61 The lawfulness of one example of eligibility criteria for disabled children's services was tested in *R (JL) v Islington LBC*,[125] where the court held the criteria to be unlawful for a variety of reasons, including that:

- 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
- in formulating the criteria, the council had failed to have proper regard to its general disability equality duty under (what is now) Equality Act 2010 s149.[126]

Duty to meet 'assessed needs'

3.62 Once it has been decided that a child's or a family's needs meet the relevant 'eligibility criteria' (ie the local authority is satisfied that it is

123 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.

124 See *R (Sanneh) v Secretary of State for Work and Pensions* [2013] EWHC 793 (Admin) at [45]:

> There is no doubt that, in exercising its obligations under section 17, a local authority is bound to consider the Article 8 rights to respect for family life of all relevant family members, but particularly the child in need; and it is bound to do so 'through the prism of Article 3(1)' of the UNCRC.

The obligation imposed by UNCRC Article 3 has been considered by the Supreme Court in the 'Benefit Cap' case: *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449. See further para 11.93.

125 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.

126 Formerly Disability Discrimination Act 1995 s49A; see para 9.99.

necessary to provide support services) 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. The services available under CSDPA 1970 and Children Act 1989 are considered separately below, but certain general points can be made:

- Services assessed as required under the CSDPA 1970 must be provided, regardless of resources. In other words, once a child has been assessed as eligible for support under the CSDPA 1970, there is a specific duty (see para 3.66) to provide them with services to meet their assessed needs, a duty which cannot be avoided because of lack of resources.[127] As the court stated in *R v Kirklees MBC ex p Daykin*:[128]

  > 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.[129]

- It follows that councils cannot, in such situations, seek to delay or attempt further rationing – for instance by placing a person on a waiting list[130] or suggesting that the case needs to go to a 'panel'.[131]
- If a service can be provided under either Children Act 1989 or CSDPA 1970, then it is provided under the CSDPA 1970.[132] In essence, the reason for this is that the more enforceable duty under the CSDPA 1970 trumps the lesser duty under the Children Act 1989 – or put another way, a local authority cannot escape its

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

128 (1997–98) 1 CCLR 512 at 525D.

129 See further *R (JL) v Islington LBC* at [106]:

> If the local authority is satisfied that it is necessary, in order to meet a child's needs, to make arrangements within a particular category on the section 2 list, it must make those arrangements. Once this point is reached, considerations such as a finite budget and sharing out resources to reach a greater number of people no longer play a part.

130 See, for example, Local government ombudsman complaint no 00/B/00599 against Essex CC, 3 September 2001.

131 See para 3.108 below concerning the requirement to identify support services where none are immediately available and L. Clements Community Care & the Law (2019) para 5.34 for discussion about the legality of funding panels.

132 *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.

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 CSDPA 1970 means that most services for disabled children and their families are, therefore, provided under the CSDPA 1970.

3.63 Even if consideration is being given to whether a needs to be provided under the Children Act 1989 (ie because it cannot be provided under the CSPDA 1970), this does not mean that a local authority need not provide it. Although in such cases there is a general duty[133] not a specific duty (see para 2.48), it is important to distinguish this from a mere 'power'. Local authorities should meet their duties (including their general duties) unless they have good reasons for failing so to do. The key considerations are likely to be:

- 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 Equality Act 2010 s149.
- 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.[134] It may also involve a breach of the specific duty imposed by CSDPA 1970 s2.
- 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,[135] particularly the *Working Together* statutory guidance.
- Local authorities cannot avoid meeting needs through placing unreasonable expectations on family carers. For example in

133 *R (G) v Barnet LBC and others* [2003] UKHL 57; (2003) 6 CCLR 500.

134 See, for example, *R v Bexley LBC ex p Jones* [1995] ELR 42 at 55.

135 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.

R (KS and AM) v Haringey LBC,[136] the determination that the risk to an autistic child caused by his housing situation was only 'moderate' relied entirely on the parent 'having the ability to be vigilant at all times throughout the day and night'. The court held that this was 'plainly unrealistic' as this was 'not the ordinary vigilance expected of a parent with a young child' and would 'not be possible for any parent on their own and [was] that much more difficult for KS given her own issues'.[137]

- The more severe the consequences of not meeting a need, the more 'anxiously'[138] will the courts and the ombudsmen scrutinise the reasons given by the council for not responding to that need,[139] any actions taken in trying to meet the needs[140] and the process by which the council arrived at its decision.[141] As Munby LJ has noted, 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.[142]
- 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 dignity[143] or family life[144] under ECHR Article 8, 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 2.14 above.[145]

3.64 It should be emphasised that it will only be in rare cases that the service required cannot be provided under the CSDPA 1970 (see below).

136 *R (KS and AM) v Haringey LBC* [2018] EWHC 587 (Admin); (2018) 21 CCLR 487 at [51].

137 At [51]–[52].

138 See para 2.7 concerning the variable degree of scrutiny the court should apply, depending on the importance of the issues.

139 See, for example, *R v Lambeth LBC ex p K* (2000) 3 CCLR 141.

140 *R v Islington LBC ex p Rixon* (1998) 1 CCLR 119.

141 *R v Ealing LBC ex p C* (2000) 3 CCLR 122.

142 *R (VC) v Newcastle CC* [2011] EWHC 2673 (Admin); (2012) 15 CCLR 194 at [26].

143 *R (A and B, X and Y) v East Sussex CC* [2003] EWHC 167; (2003) 6 CCLR 194.

144 *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin); (2002) 5 CCLR 577.

145 See *Anufrijeva v Southwark LBC* [2004] QB 1124; (2003) 6 CCLR 415 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 suggest that this will particularly be so where the family includes a disabled child.

3.65 Legally, the relationship between the 1970 and the 1989 Acts is one that has attracted considerable judicial attention.[146] To put it succinctly (but perhaps for non-lawyers, incomprehensibly!) – services provided under CSDPA 1970 s2 are in fact provided by a local authority in the 'exercise of their functions' under Children Act 1989 Part III.[147] This reinforces the fact that an assessment under the Children Act 1989 can and should lead to a decision on whether services have to be provided under the CSDPA 1970.

Services under the Chronically Sick and Disabled Persons Act 1970

3.66 The CSDPA 1970 places a specific duty on a local authority to provide the support which a disabled child is assessed as needing – if that support comes within its scope (see below). As *Working Together* states:

> Where a local authority is satisfied that the identified services and assistance can be provided under section 2 of the CSDPA, and it is necessary in order to meet a disabled child's needs, it must arrange to provide that support.[148]

3.67 If the need for the support is (for example) five hours of home/short break care a week, then the local authority must provide five hours. It cannot delay[149] or 'trim'[150] the package for financial reasons. If the service that is required is not available for any reason, the authority must provide a suitable substitute support in the interim while taking urgent steps to ensure that the suitable service is made available.[151] If the family decide that it wants the need to be met by a direct payment

146 For a review of the previous case-law, see L Clements and P Thompson, *Community care and the law*, 5th edn, LAG, 2011, paras 9.148–9.153.

147 The Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015 SI No 914. See also *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302; (2005) 8 CCLR 272.

148 *Working Together*, p22, para 28. See also to similar effect the SEND Code at para 3.49 in relation to EHC assessments and plans:

> Where a child or young person has been assessed as having social care needs in relation to their SEN or disabilities social care teams *must* secure social care provision under the Chronically Sick and Disabled Persons Act (CSDPA) 1970 which has been assessed as being necessary to support a child or young person's SEN and which is specified in their EHC plan [emphasis as original].

149 Local government ombudsman complaint no 00/B/00599 against Essex CC, 3 September 2001.

150 *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119 at 129B.

151 *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119 at 129B.

(see para 3.98 below) the amount of the payment must be sufficient to meet the need – but the local authority cannot insist that the family have a direct payment (ie the family can require the local authority to arrange or commission the support required).

3.68 CSDPA 1970 s2 provides a list of services that councils must provide to disabled children.[152] In practice, this includes services of great importance, such as short breaks (also known as 'respite care' and increasingly referred to as 'short break' or 'replacement' care), 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 Children Act 1989 s17. The list of services which can be provided under CSDPA 1970 s2 is summarised below.

Practical assistance in the home

3.69 The provision covers a very wide range of home-based (sometimes called 'domiciliary') care services, although it does not cover health-care services even if these do not have to be provided by qualified health professionals.[153] 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 short breaks

3.70 Short break (or respite) care is a 'highly valued' service[154] – giving families and the disabled child the chance to have time apart – or at

152 CSDPA 1970 s28A (although this has now been superseded in England by amendments to section 2 itself), inserted by the Children Act 1989, expressly extended the CSDPA 1970 s2 to children. From 1 April 2015, the CSDPA duty to disabled adults has been superseded by the Care Act 2014.

153 *R (T, D and B) v Haringey LBC* [2005] EWHC 2235 (Admin); (2006) 9 CCLR 58.

154 For example: C Hatton, M Collins, V Welch, J Robertson, E Emerson, S Langer and E Wells, *The Impact of Short Term Breaks on Families with a Disabled Child Over Time,* Department for Education, DFE-RR173, 2011; Contact a Family, *What makes my family stronger,* 2009; 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.

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.[155] 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 CSDPA 1970 s2(6)(a) (ie as 'practical assistance in the home') and community-based support is provided under section 2(6)(c) (ie as recreational/educational facilities 'outside his home'). 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 will generally be provided under Children Act 1989 (see para 3.81).

Wireless, television, library 'or similar recreational facilities'

3.71 The use of the phrase in CSDPA 1970 s2(6)(b) of 'or similar recreational facilities' means that this provision could include such things as a computer, gaming consoles and other recreational equipment as well as 'talking books' (ie audio book service for people with visual impairments).[156]

Recreational/educational facilities

3.72 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

155 HM Treasury/Department for Education and Skills, *Aiming high for disabled children*, 2007; and see HM Government, *The Children Act 1989 Guidance and Regulations. Volume 2: Care Planning, Placement and Case Review*, DCSF Publications, 2015, chapter 6.

156 Complaint No 11 017 875 against Suffolk County Council, 11 October 2012, para 6.

is being provided with care and support in the community, then he or she is having a short break from his or her family.

3.73 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 3.53), 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).

3.74 Services under this provision also include those which assist the disabled child '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 child to access education – for example, help with the child's personal care requirements while the child pursues his or her studies,[157] as well as escorted travel to and from the education setting[158] and possibly the provision of additional facilities at the institution[159] (although these might also be required under the Equality Act 2010 – see paras 9.44 below).

Travel and other assistance

3.75 Local authorities must, when assessing a disabled child's need for community-based support, also consider that child's travel needs to enable the child to access that service. Where it is necessary for transport to be provided from the child's home, then this must be arranged under CSDPA 1970 s2(6)(d). It is not acceptable for a local authority to have a blanket policy that it will not provide such transport, for example by reference to an expectation that parents will always provide transport – or for it to state that a disabled child's mobility

157 See Department of Health *LAC(93)12 – Further and Higher Education Act 1992*.

158 Note, however, the detailed statutory scheme in relation to school and college transport, see chapter 4 on education. If transport to an education facility can be provided under the Education Act 1996 then this would normally take precedence over the CSDPA 1970 transport duty as such provision would not be 'necessary' for the purposes of the 1970 Act.

159 *R (AM) v Birmingham CC* [2009] EWHC 688 (Admin); (2009) 12 CCLR 407.

component of disability living allowance (DLA) should be used to cover this. While local authorities are permitted to charge for services under the CSDPA 1970 (see para 3.156), the law requires that in assessing the charge, entitlement to the mobility component of disability living allowance must be ignored.[160]

3.76 If a disabled child needs travel assistance to a community-based activity, then that is clearly a 'need', regardless of whether the child is or is not receiving a social security benefit. Because of local authority misunderstandings about this question, Department of Health guidance[161] was issued in 2012 which states that the 'Department would like to make the position clear' that:

> . . . local councils have a duty to assess the needs of any person for whom the authority may provide or arrange the provision of community care services and who may be in need of such services. They have a further duty to decide, having regard to the results of the assessment, what, if any, services they should provide to meet the individual's needs. This duty does not change because a particular individual is receiving the mobility component of Disability Living Allowance.

Home adaptations, fixtures and fittings

3.77 This provision covers situations where an authority assesses a disabled child 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. The duty imposed by the CSDPA is to provide 'assistance' in 'arranging for' the carrying out of any adaptations or the provision of any additional facilities. 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 para 6.57). 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, or the work is required to a second home (eg because the parents have separated), then the council will have to consider

160 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.

161 Department of Health, *Charging for Residential Accommodation and Non-Residential Care Services*, 2012, LAC(DH)(2012)03 (policy guidance) paras 9–11.

making the additional sums available to comply with its duty under CSDPA 1970 s2.[162]

Holidays, meals and telephones

3.78 The authority must consider a disabled child needs 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 minicoms 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.[163] It is important for local authorities to keep in mind that families with disabled children will have a right to support with the cost of holidays where this is accepted to be necessary to meet the child's needs – and that this can include the basic cost, not merely disability-related extra costs.[164]

Services under Children Act 1989 Part III

3.79 Although the range of services which can be provided under the CSDPA 1970 is 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 Children Act 1989 s17(6).[165] However, a more commonly encountered support service which cannot be provided through the CSDPA 1970 is residential short breaks (still frequently referred to as 'respite').

3.80 Where a local authority considers that another authority (for example a local housing authority or a clinical commissioning group)

162 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.

163 One week's holiday a year away from the home is a core criterion within the Townsend Deprivation Index – see P Townsend, P Phillimore and A Beattie, *Health and deprivation: inequality and the North*, Croom Helm, 1988.

164 *R v North Yorkshire CC ex p Hargreaves (No 2)* (1997–98) 1 CCLR 331.

165 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, but note that 'housing provision under s17(6) is a measure of last resort reserved for exceptional cases'; *R (J) v Hillingdon LBC* [2017] EWHC 3411 (Admin); (2018) 21 CCLR 144 at [75].

could help it meet the needs of a child 'in need', then it may make a formal request for such assistance.[166] The partner authority must comply with the request unless it is incompatible with its legal duties or would 'unduly prejudice the discharge of any of [its] functions' to do so.[167]

Respite care/short breaks away from the home

3.81 As noted above, while much short break/respite care is provided under the CSDPA 1970 in the home or community (or via direct payment (see para 3.98 below), it may also be provided in residential units, in hospices or by foster carers. In *R (JL) v Islington LBC*,[168] the court confirmed that residential and other overnight short break care could not be provided under the CSDPA 1970 and that, as a general rule, such support is provided by councils under Children Act 1989 s17(6) or s20(4).[169] It is also, however, possible that residential short breaks would need to be provided under the specific duty created by Children Act 1989 s20(1) to meet 'actual crises'[170] – see para 3.136 below.

3.82 This is of importance, since the duty under Children Act 1989 s20(1) is not a 'target duty' but one that is specifically enforceable (see para 2.47). In the judge's opinion in the *Islington* case, however, the section 20(1) duty would only arise when a parent was 'immediately' prevented from providing a disabled child with suitable care and accommodation.[171]

3.83 Statutory guidance[172] has been published to assist with the decision as to the relevant statutory provision when residential short

166 Children Act 1989 s27.

167 Children Act 1989 s27(2).

168 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.

169 Section 20(4) 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.

170 *R (JL) v Islington LBC* at [96].

171 *R (JL) v Islington LBC* at [95]–[96].

172 Department for Children, Schools and Families, *Short Breaks: Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks*, April 2010 ('Short Breaks Statutory Guidance'). This guidance was issued alongside the Care Planning, Placement and Case Review (England) Regulations 2010 ('the 2010 Regulations') SI No 959, see para 1.6. See also chapter 6 of HM Government, *The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review*, June 2015.

breaks are being provided. Chapter 2 of the guidance deals with short breaks involving the provision of accommodation. The guidance does not mention the Children Act 1989 s20(1) duty, considering instead whether a residential short break should be provided under Children Act 1989 s17(6) or s20(4). The importance of this distinction is that it is only where a residential short break is provided under section 20 that the child may acquire 'looked after' status.

3.84 In simple terms, a child is 'looked after' if she or he is in the care of a local authority or if it is providing the child with accommodation (unless that accommodation is provided under Children Act 1989 s17 – for example, as short break care).[173] See further, para 3.92 below.

3.85 The guidance states that the decision as to which statutory provision applies to a residential short break:

> . . . should be informed by their assessment of the child's needs and should take account of parenting capacity and wider family and environmental factors, the wishes and feelings of the child and his/her parents and the nature of the service to be provided.[174]

The 'key question' is said to be 'how to promote and safeguard the welfare of the child most effectively'.[175] Depending on the circumstances of the child and family:

> . . . the assessment, planning and review processes for children in need may be appropriate or the additional requirements for looked after children may be more appropriate.

3.86 The guidance provides a lengthy list of factors which local authorities should take into account in determining whether short breaks are to be provided under Children Act 1989 s17(6) or s20(4).[176] These include:

- any particular vulnerabilities of the child;
- the length of time away from home and the frequency of such stays;[177]

173 The formal definition of 'looked-after' status is found in Children Act 1989 s22(1).

174 Short Breaks Statutory Guidance, para 2.5.

175 Short Breaks Statutory Guidance, para 2.7.

176 Short Breaks Statutory Guidance, para 2.8.

177 The guidance states that 'the less time the child spends away from home the more likely it is to be appropriate to provide accommodation under section 17(6)'.

- whether short breaks are to be provided in more than one place;[178]
- the views of the child and views of parents;[179]
- the extent of contact between short break carers and the child's family and between the child and the family during the placement;[180]
- distance from home; and
- the need for an independent reviewing officer (IRO)[181] to monitor the child's case and to chair reviews.

3.87 Taking matters in the round, the guidance suggests at para 2.12 that children whose welfare will be best safeguarded by becoming 'looked after' during residential short breaks include:

- children who have substantial packages of short breaks sometimes in more than one setting; and
- children whose families have limited resources and may have difficulties supporting the child or monitoring the quality of care while they are away from home.

3.88 The guidance further highlights[182] that the relevant regulations for looked-after children[183] (see para 3.147 below) are modified in their application to some residential short breaks. The modified scheme applies where no single placement is intended to last for more than 17 days and the total of short breaks in one year does not exceed 75 days. However, this only applies where children receive short breaks in a single setting; where a child goes to multiple settings the full looked-after scheme applies.

178 The guidance states that 'where the child spends short breaks in different settings, including residential schools, hospices and social care placements, it is more likely to be appropriate to provide accommodation under section 20(4)'.

179 The guidance states that 'some children and parents may be reassured by, and in favour of, the status of a looked-after child, while others may resent the implications and associations of looked-after status'. It is essential, however, that any such views must be properly informed, including as to the benefits which accrue from 'looked-after' status.

180 There is no further guidance on this point, although it can be assumed that where there is significant ongoing contact with family during short breaks then this points towards the service being provided under Children Act 1989 s17(6).

181 An IRO will not be appointed where accommodation is provided pursuant to Children Act 1989 s17(6) as appointment of an IRO is one of the requirements of 'looked-after' status.

182 Short Breaks Statutory Guidance, paras 2.16–2.23.

183 Care Planning, Placement and Case Review (England) Regulations 2010 SI No 959 reg 48.

3.89 There is a helpful table in the guidance[184] which summarises the different effect of residential short breaks being provided where regulation 48 does and does not apply:

- Where regulation 48 applies, the local authority must put in place a short break care plan 'addressing issues key to the safe care of the child' and must appoint an IRO. The visiting and review requirements are less onerous than when the child has full 'looked-after' status.
- Where regulation 48 does not apply, then the full requirements of the 2010 regulations take effect. The local authority must put in place a care plan, an IRO must be appointed and the child's case must be reviewed regularly.

3.90 Guidance is given on the requirements of a short break care plan in cases where regulation 48 applies. The plan should 'focus on setting out those matters which will ensure that the child's needs can be fully met while the child is away from his/her parents'. It should be linked to the child in need plan (see para 3.108 below); the guidance makes clear that: 'There should not be separate plans which duplicate information'. The guidance notes that: 'Parents must be fully involved in all aspects of agreeing the short break plan. As far as is practicable, children should also be involved in agreeing the plan'.[185]

3.91 Chapter 3 of the guidance deals with assessment, planning and review in the context of short break provision. While this chapter may still contain some valuable guidance, it is likely that much of it has been superseded by the *Working Together* statutory guidance discussed extensively in this chapter. There is guidance on the technical requirements relating to the provision of short breaks in different settings in chapter 4, although again this may now be somewhat out of date. Chapter 5 of the guidance highlights the right for families to obtain direct payments to meet a child's needs for short breaks instead of receiving a service direct from the local authority; see para 3.100 below.

Short breaks generally

3.92 Children Act 1989 Sch 2 para 6(1)(c) requires local authorities to provide services designed to assist family carers of disabled children 'to continue to [provide care], or to do so more effectively, by giving

184 Short Breaks Statutory Guidance, p16.

185 Short Breaks Statutory Guidance, paras 2.19–2.24.

them breaks from caring'. Regulations[186] made under the Act in 2011 require that local authorities, when discharging this duty, have regard to the needs of family carers:

> . . . who would be able to provide care for their disabled child more effectively if breaks from caring were given to them to allow them to:
> (i) undertake education, training or any regular leisure activity,
> (ii) meet the needs of other children in the family more effectively, or
> (iii) carry out day to day tasks which they must perform in order to run their household' (reg 3(b)).

These are, therefore, the statutory goals to which local authorities should be directing their provision of short breaks, both in terms of planning and commissioning services and in making decisions on individual cases. Despite this, evidence from the Every Disabled Child Matters campaign in 2015 suggested that more than half of local authorities have cut spending on short breaks (respite services) for families with disabled children since 2011/12.[187] In *R (DAT) v West Berkshire Council*,[188] Laing J held that two decisions by a council to reduce the funding made available for voluntary sector groups to provide short breaks were unlawful, in essence because of a failure to consider the various matters required by the relevant statutory duties and a misdirection as to the requirements of the 'public sector equality duty' (PSED) under the Equality Act 2010 (see para 9.99) (decision 1) and because of apparent predetermination (decision 2).

3.93 Regulation 4 of the 2011 regulations states that 'a local authority must provide, so far as is reasonably practicable, a range of services which is sufficient to assist carers to continue to provide care or to do so more effectively'. These services must include a range of daytime care, overnight care and leisure activities (regulation 4(2)). This range of services must be set out in a 'short breaks services statement' (regulation 5).[189] This statement must include the range of services provided in accordance with regulation 4, any criteria by which eligibility for those services will be assessed, and how the range of services is designed to meet the needs of carers in the area.

3.94 Read as a whole, therefore, the 2011 regulations impose a duty on local authorities to secure a sufficient supply of a wide range of short break services and to publish clear and transparent information

186 Breaks for Carers of Disabled Children Regulations 2011 SI No 707.

187 Every Disabled Child Matters, *Short breaks in 2015: An uncertain future*, 2015.

188 [2016] EWHC 1876 (Admin); (2016) 19 CCLR 362.

189 The SEND Code requires at para 4.44 that the short breaks services statement should be published with the 'local offer' for each local authority.

about these services and how they can be accessed. It will be noted that the 2011 regulations do not refer to the need for parent carers of disabled children to work; this because the service which supports work is childcare, which is governed by the Childcare Act 2006.[190] Parent carers of disabled children may require childcare services in order to work *and* short break services in order to live 'ordinary lives'.

3.95 Advice published by the Department of Education in 2011[191] provides a helpful summary for local authorities of the requirements imposed by the 2011 regulations – including a requirement that local authorities must consider 'the legal implications of the eligibility criteria they apply to short breaks services'. The advice suggests they should 'not apply any eligibility criteria mechanistically without consideration of a particular family's needs'.[192]

3.96 The advice also provides a helpful summary of the benefits of short breaks both for disabled children and parents:

> Children benefit from new interests, relationships and activities, while parents can catch up with 'everyday activities' (sleep, cleaning, shopping), attend to their physical and psychological wellbeing, and maintain and develop social networks.

The advice reiterates a central theme of the 2011 regulations, being that 'short breaks should not just be there for those at crisis point'. The advice correctly notes that 'local authorities must give families the choice to access short breaks services using a direct payment'.

3.97 The advice describes the benefit of a 'local offer' of non-assessed short breaks to which families with disabled children can refer themselves. It notes the importance of having fair eligibility criteria for this kind of service but states that '[l]ocal authorities can provide families with access to short breaks services without any assessment'. However, it appears, from the authors' personal experience, that these low-level support services are being rolled back or cut completely at present as a result of reductions in central government funding for local authorities.

190 Childcare Act 2006 s6 imposes a duty on local authorities to secure, so far as reasonably practicable, the provision of sufficient childcare for working parents of disabled children up to the age of 18.

191 Department for Education, *Short Breaks for Carers of Disabled Children: Departmental advice for local authorities*, March 2011.

192 Department for Education, *Short Breaks for Carers of Disabled Children: Departmental advice for local authorities*, March 2011, p4. See further chapter 4 of the advice.

Direct payments

3.98 Instead of the authority arranging for services to be provided to a disabled child and other family members, 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).[193] The right to insist on a direct payment applies regardless of whether the support is provided under the CSDPA 1970 or the Children Act 1989.[194] The statutory scheme governing direct payments derives from Children Act 1989 s17A and has been fleshed out by regulations[195] and detailed guidance.[196] Local authorities are under a duty to make a direct payment where:[197]

- the person appears to the responsible authority to be capable of managing a direct payment by himself or herself or with such assistance as may be available to the person;
- the person consents to the making of a direct payment (local authorities cannot insist that a person has 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.

The guidance states that the amount of the direct payment:

> . . . must be equivalent to the council's estimate of the reasonable cost of securing the provision of the service concerned, subject to any

193 Direct payments for those aged 18 or over are governed by Care Act 2014 ss31–33 and Care and Support (Direct Payments) Regulations 2014 SI No 2871.

194 This derives from the fact that services provided under CSDPA 1970 s2 are technically provided in discharge of a local authority's functions under Children Act 1989 Part III – see para 3.65 above.

195 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887.

196 Department of Health, *Guidance on direct payments for community care, services for carers and children's services England*, 2009 (amended 29 October 2010). In relation to adults, the guidance has been replaced by the Statutory Guidance to the Care Act 2014 (Department of Health), chapter 12 – but at the time of publication the 2009 guidance remains relevant to disabled children, although it has been placed on the online National Archives.

197 Regulation 7(1)(c).

> contribution from the recipient. This means that the direct payments should be sufficient to enable the recipient lawfully to secure a service of a standard that the council considers is reasonable to fulfil the needs for the service to which the payments relate. There is no limit on the maximum or minimum amount of direct payment either in the amount of care it is intended to purchase or on the value of the direct payment.[198]

The guidance further states that 'councils should include associated costs that are necessarily incurred in securing provision, without which the service could not be provided or could not lawfully be provided'. These may include 'recruitment costs, National Insurance, statutory holiday pay, sick pay, maternity pay, employers' liability insurance, public liability insurance and VAT'.[199]

3.99 The regulations[200] place restrictions on the use of direct payments to pay a relative who lives in the same household as the disabled child (but 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. 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

3.100 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 to 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

198 Department of Health, *Guidance on direct payments for community care, services for carers and children's services England*, 2009 (amended 29 October 2010), para 111.

199 Department of Health, *Guidance on direct payments for community care, services for carers and children's services England*, 2009 (amended 29 October 2010), para 114.

200 Regulation 11.

was the responsibility of the parents, whether or not children have a disability';[201] and

- to have a policy of refusing direct payments for certain services – such as short (overnight) breaks.[202]

3.101 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),[203] 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.[204]

Independent user trusts

3.102 Although the Direct Payment Regulations 2009[205] 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 be paid to someone on his or her behalf – if (among other things) that third party agrees.[206] It follows that on a child becoming an adult, a change in the payment arrangements has to take place – although this need not be problematic. 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

201 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.

202 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'.

203 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887 reg 13.

204 Department of Health, *Guidance on direct payments for community care, services for carers and children's services England 2009*, 2009, paras 101–103.

205 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 SI No 1887.

206 Direct payments to disabled adults and their carers are now governed by Care Act 2014 s31 (adults with capacity) and s32 (adults without capacity) and the Care and Support (Direct Payments) Regulations 2014 SI No 2871.

disabled child will be the initial trustees of such a trust. Such arrangements, which the courts have held to be lawful,[207] have some practical benefits over and above securing continuity of care arrangements during the transition into adulthood (see chapter 10 below) – and these include the fact that the NHS is also permitted to make payments to such a trust.[208]

Personal budgets and personalisation

3.103 Many children and families are advised that their entitlement to services takes the form of a 'personal budget'. The idea behind such an arrangement is that a personal budget can provide some of the benefits of a direct payment without the disabled person or the parent having to take on the full responsibilities of managing a direct payment. In theory, the individual is encouraged to decide in what other ways the money could be spent to maximise their child's sense of independence and well-being. In this intermediate phase, instead of a direct payment being made, 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.

3.104 All adults who are eligible for care services in England must be told the cost of their care arrangements (ie their 'personal budget') even if the services are arranged by or provided directly by the local authority.[209]

3.105 These principles are now embedded in statute in relation to disabled children who have an EHC plan[210] and this entitlement is considered at para 4.168 below.

3.106 While many of the principles underpinning the personalisation agenda are admirable, it has had its critics[211] and the implementation

207 *R (A and B) v East Sussex CC (No 1)* [2002] EWHC 2771 (Admin); (2003) 6 CCLR 177.

208 For further consideration of such trusts, see L Clements, *Community care and the law*, 7th edn, LAG, 2019, para 11.114.

209 Care Act 2014 s25(1)(e).

210 CFA 2014 s49 – the SEND Code stating that (para 3.38): 'Young people and parents of children who have EHC plans have the right to request a Personal Budget, which may contain elements of education, social care and health funding.'

211 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.

has caused not insignificant difficulties – particularly in relation to what are termed 'resource allocation systems/schemes' (RAS). RAS (which it appears are being discarded by many local authorities[212]) endeavour to give the 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.

3.107 Admirable as this may sound, in practice the process is often disempowering – so that families with disabled children do not appreciate that they do not have to accept the 'indicative amount' (which may be less than they are presently receiving or insufficient to enable them to have their care needs addressed satisfactorily).[213] 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 para 3.62) to meet eligible assessed needs.[214]

212 See L Series and L Clements, 'Putting the Cart before the Horse: Resource Allocation Systems and Community Care', (2013) 2 *Journal of Social Welfare Law*, pp207–226.

213 This was found by Black J to be the case in *R (JL) v Islington LBC* [2009] EWHC 458 (Admin); (2009) 12 CCLR 322, 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'.

214 *R (KM) v Cambridgeshire CC* [2012] UKSC 23; (2012) 15 CCLR 374 – see, for example, the judgment of Lord Wilson at [28]:

> What is crucial is that, once the starting point (or indicative sum) has finally been identified, the requisite services in the particular case should be costed in a reasonable degree of detail so that a judgment can be made whether the indicative sum is too high, too low or about right.

Care plans: the 'how, who, what and when'

Overview

3.108 The assessment and care planning process requires that the local authority construct a care plan that (among other things) describes the services that will be provided in order to meet the disabled child's identified 'needs'. For example, an assessment may identify that the child needs adaptations to the house in order that they can access the bathroom, that they need regular home help support at meal times and that their parents need to have regular short breaks – in order to be able to sustain their caring roles. The care plan should specify how these identified needs are going to be met. In relation to some needs, it may not be possible to state immediately how they will be met (for instance, the adaptations) – and in this case the care plan should specify the steps that the local authority will take to ensure that the needs are met within a reasonable time.

3.109 Although there is no general requirement in the Children Act 1989 to prepare a 'care plan' for a disabled child, the courts have held that such a document is required to be prepared since it is a 'the means by which the local authority assembles the relevant information and applies it to the statutory ends, and hence affords good evidence to any inquirer of the due discharge of its statutory duties'.[215] A 'plan of action' is also required by the *Working Together* statutory guidance, see para 3.111 below.

3.110 An example of what a care plan should contain is given in the 2010 short breaks statutory guidance,[216] namely:

- have clear and realistic objectives;
- include ascertainable wishes and feelings of the child and views of the family;
- follow consideration of options, including but not limited to direct payments;
- state the nature and frequency of services, as far as is practicable, including health and social care in the same plan, especially if short breaks are provided from different agencies;

215 *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119, 128D.

216 Department of Children and Family Services, *Short Breaks: Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks*, March 2010, para 3.16.

- state the child's health, emotional and behavioural development, including full details about any disabilities and clinical needs the child may have and medications the child may require;
- state the child's specific communication needs, especially for children who communicate non-verbally, and include the child's likes and dislikes with particular regard to leisure activities;
- include the results of all necessary risk assessments which could include, depending on the child's impairment, moving and handling, invasive procedures, and behaviour;
- state contact arrangements for emergencies;
- state commitments of professionals involved;
- refer to or summarise any other important documents about the child's development;
- confirm those caring for the child have been selected following the advice set out in government guidance on direct payments;
- outline arrangements to review the plan.

3.111 *Working Together* states that:

> Where the outcome of the assessment is continued local authority children's social care involvement, the social worker should agree a plan of action with other practitioners and discuss this with the child and their family. The plan should set out what services are to be delivered, and what actions are to be undertaken, by whom and for what purpose.[217]

A care plan produced following an assessment under *Working Together* is frequently referred to as a 'child in need plan'. Previous (2000) policy guidance, the *Framework for the Assessment of Children in Need and their Families*,[218] made the following comment concerning care plans:

> It is essential that the plan is constructed on the basis of the findings from the assessment and that this plan is reviewed and refined over time to ensure the agreed case objectives are achieved. Specific outcomes for the child, expressed in terms of their health and development can be measured. These provide objective evidence against which to evaluate whether the child and family have been provided with appropriate services and ultimately whether the child's wellbeing is optimal.

217 *Working Together*, p30, para 64.

218 Department of Health, *Framework for the Assessment of Children in Need and their Families*, 2000, para 4.37.

3.112 In *R (J) v Caerphilly CBC,*[219] it was held that care plans must:

> . . . set out the operational objectives with sufficient detail – including detail of the 'how, who, what and when' – to enable the care plan itself to be used as a means of checking whether or not those objectives are being met.

In *R (AB and SB) v Nottingham CC,*[220] the council's care plan was 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'.[221] The same approach was followed in *R (S) v Plymouth CC*,[222] 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. In *R (J) v Hillingdon LBC*,[223] the court criticised a child in need plan that did not properly identify or address the risks of harm to a disabled child caused by his housing situation. In particular, the plan did not recognise the need for ongoing oversight by children's services, thus allowing the case to be closed. Nor did it signal to the housing department the importance of the child's need for rehousing.

3.113 A 2014 ombudsman's report held (in similar terms) that an assessment of a disabled child must be more than merely a descriptive document: it must spell out with precision what the child's needs are, what the impact of the disability is on the child's carer(s) and whether the child and the carers needs can be met and can continue to be met into the future. The assessment must result in a care plan that identifies the child's needs, what is to be done about these needs, by whom and when. If a direct payment is made, it must specify precisely what need these payments are intended to meet, why this level of payment is considered appropriate, or what outcome this will result in.[224]

3.114 The fact that a care need requires non-routine arrangements, does not obviate the need for a local authority to provide services to meet it. This elementary point is illustrated by a 2011 ombudsman's

219 [2005] EWHC 586 (Admin); (2005) 8 CCLR 255. This case is discussed in detail at paras 10.58–10.59.

220 [2001] EWHC 235 (Admin); (2001) 4 CCLR 294.

221 [2001] EWHC 235 (Admin); (2001) 4 CCLR 294 at [43].

222 [2009] EWHC 1499 (Admin).

223 *R (J) v Hillingdon LBC* [2017] EWHC 3411 (Admin); (2018) 21 CCLR 144 at [59].

224 Local government ombudsman complaint no 13 002 982 against Birmingham City Council, 12 March 2014.

complaint.[225] A disabled deaf child was found on assessment to have complex needs – including a need for respite care. This was a problem, since the council was unable to locate a carer who was able to provide support and who also had the necessary British Sign Language (BSL) skills. To this, the ombudsman commented:

> There is no evidence that it considered the obvious and sensible expedient of paying two people to work together, one to communicate with H and the other to provide for her care. Nor did it explore whether it could fund a carer to be trained in BSL.

3.115 The importance of lawful assessments and care planning was highlighted in a 2013 local government ombudsman report[226] which concerned a profoundly disabled 14-year-old girl (her condition was degenerative; she was blind, profoundly deaf with severe physical and learning disabilities: she required constant supervision and was dependent on her parents to meet all her needs). Direct payments were being paid, and due to the need to keep the number of people involved in the daughter's care to a minimum – to reduce her stress – the direct payments were being used to pay her father to provide the care.

3.116 As a result of the daughter's needs increasing, the family requested a reassessment to increase the direct payments. The local authority began a core assessment, rejected the request for increased support (stating that the current funding was adequate) and stated that it would no longer be prepared to allow the father to be paid with the direct payments.

3.117 In finding maladministration, the ombudsman noted that although the assessment described the daughter's complex 'exceptional' needs and that these were increasing – it said nothing about how these needs were to be met (other than by her parents). It described the impact on her parents but said nothing about their needs as carers. It acknowledged that her parents were best placed to provide the care (particularly given her communication difficulties) but gave no rational reason for requiring the direct payments to be used for an alternative carer. The ombudsman further noted that the council was unable to explain how it decided that the current package of care would meet the daughter's needs – and that the assessment contained no precise identification of her needs, nor what needed 'to be done about them, by whom and when'. The ombudsman

225 Complaint no 09 004 278 against Leeds City Council, 1 July 2011, paras 153–154.

226 Complaint no 12 015 328 against Calderdale Council, 20 November 2013.

considered that there had not been an 'adequate assessment' of the daughter's needs, nor her parents' needs (as 'carers') at any time in the previous ten years.

Reassessments and reviews

3.118 Local authorities must keep under review the care needs of disabled children and their families. A care plan should normally specify a 'review date' which will ordinarily be within 12 months – although where there is a material change in a disabled child's needs, a reassessment should be undertaken without delay.[227] In *R (J) v Hillingdon LBC*,[228] the court criticised the absence of any 'provision or mechanism for reviewing the progress and deciding whether it was sufficient "to meet the child's needs and the level of risk faced by the child" '. The Local Government and Social Care Ombudsman (LGO) has held that once support needs have been put in place the level of service should continue until there has been a reassessment.[229] A reassessment/review should be undertaken to ascertain if the person's care needs have changed and if so – if there is a need to make changes to their care plan: a 'review must not be used as a mechanism to arbitrarily reduce' the level of a person's care support.[230]

3.119 Despite the detailed requirements of the statutory scheme and the established principles of public law, reports by the LGO continue to demonstrate local authorities making serial errors constituting maladministration. A 2014 report concerning Birmingham City Council[231] is illustrative for this purpose:

- A direct payment to provide ten hours per month support was being made to the parent of a disabled child.
- Despite the mother's request that this be increased, the local authority did not reassess and indeed 'lost sight of this child' for almost five years, simply continuing to pay direct payments for the ten hours per month.

227 *Working Together* states (p29, para 66) that 'The [child in need] plan should be reviewed regularly to analyse whether sufficient progress has been made to meet the child's needs and the level of risk faced by the child' – although of course the reference to 'level of risk' may be inapposite in many disabled children's cases.

228 [2017] EWHC 3411 (Admin); (2018) 21 CCLR 144 at [63](i).

229 Complaint no 11/010/725 against Lambeth LBC, 16 August 2012.

230 Department of Health, *Care and Support Statutory Guidance*, 2014, para 13.4.

231 Complaint no 13 002 982, 12 March 2014.

- When finally a reassessment was completed – although it was flawed and was not shown to the parent – it was used by the authority's 'panel' to determine that the ten hours of support per month remained adequate.

3.120 A complaint eventually resulted in a new assessment – but sadly this still contained errors and did not fully consider the child's needs and his mother's needs as a carer and (again) had not been discussed with her. There was no care plan to explain what need the ten hours of direct payments was to address, and what outcome was expected from providing the support.[232] In addition to recommending substantial financial compensation, the ombudsman advised that an independent social worker undertake (within a fixed timescale) an assessment of the child's needs and her mother's needs (as a carer).

Social care needs and EHC plans

3.121 Where a child has an EHC plan (see para 4.107), the SEND Code provides specific detail as to the way the provision must be set out in the plan (sections H1 and/or H2). Section H1 must contain the provision which must be made under CSDPA 1970 s2 (see above para 3.66). The SEND Code requires that provision in Section H1:

> . . . should be detailed and specific and should normally be quantified, for example, in terms of the type of support and who will provide it (including where this is to be secured through a social care direct payment).[233]

It also reiterates that provision should be clearly linked to the achievement of the outcomes specified in the plan.

3.122 Section H2 of the EHC plan is reserved (in the case of children[234]) for other provision not required by the CSDPA 1970 but which is 'reasonably required by the learning difficulties or disabilities which

232 In the main report at para 63, the ombudsman noted that: 'The assessments do not consider X's needs in accordance with Birmingham City Council's eligibility criteria for services provided under its Short Breaks Services Statement.'

233 SEND Code, p167.

234 Because the CSDPA 1970 no longer applies to adults (those aged over 18), all the social care provision in an EHC plan for an adult should be in Section H2.

result in the child or young person having SEN'.[235] The code suggests (p168) that this 'may include provision identified through early help and children in need assessments and safeguarding assessments for children'. Having reiterated that provision required under the CSDPA 1970 must be set out in Section H1, the code suggests two categories of social services which may need to be included in Section H2:

- *Residential short breaks*. This is plainly correct as this is not a service which can be provided under the CSDPA 1970; see para 3.81 above.
- *'Services provided to children arising from their SEN but unrelated to a disability'*. It is far from clear what if any services would fall within this category in practice. Given the breadth of the CSDPA 1970 duty, it may well be that the only category of service which should routinely be included in Section H2 of EHC plans for children is residential short breaks.

3.123 The CFA 2014 imposes no new duty to make provision in relation to the social care element of an EHC plan. As the SEND Code notes:

> For social care provision specified in the plan, existing duties on social care services to assess and provide for the needs of disabled children and young people under the Children Act 1989 continue to apply.[236]

3.124 EHC plans must be reviewed at least every 12 months.[237] Each review should consider the social care provision made and 'its effectiveness in ensuring good progress towards outcomes'.[238] Although a representative of social care must be invited to the review and given two weeks' notice of the meeting, there is no absolute requirement in the SEND Code that they should attend. However, it is difficult to see how the requirements of the review can be achieved without direct input from children's social care in cases where there is any social care provision being made under the plan. The SEND Code states that 'EHC plan reviews should be synchronised with social care plan

235 The local authority may also choose to specify in Section H2 other social care provision reasonably required by the child or young person, which is not linked to their learning difficulties or disabilities; SEND Code, p169. All social care provision for adults with EHC plans must be in Section H2.

236 SEND Code, para 9.137.

237 CFA 2014 s44.

238 SEND Code, para 9.167.

reviews, and must always meet the needs of the individual child'.[239] In relation to social services involvement in transitional plans, see also para 10.17 below).

3.125 The provisions of the CFA 2014 Part 3 have been extended in modified form to young people in youth custody (see para 4.184 below). The SEND Code states that:

> Local authorities should also consider whether any social care needs identified in the EHC plan will remain while the detained person is in custody and provide appropriate provision if necessary. For example, if a detained child is looked after, the existing relationship with their social worker should continue and the detained child should continue to access specific services and support where needed.[240]

3.126 Local authorities may also need to carry out an assessment of detained children and young people to consider their post-detention education, health and care needs and whether an EHC plan will be required.

3.127 The CFA 2014 s51 provides no right of appeal to a tribunal in relation to the social care (or health) elements of the EHC plan. In 2015, a pilot scheme was established[241] in 13 authorities to allow the tribunal to make non-binding recommendations in relation to social care (and health) provision. At the time of writing, this was being followed by a two-year national trial which began on 3 April 2018.[242] See chapter 11 at para 11.74 for further discussion of the tribunal's powers under the national trial, including the non-binding nature of the recommendations it can make in relation to social care (and health). Disagreement resolution and mediation services should also cover social care disputes in relation to EHC plans in every local authority.[243] Complaints can also be made under the Children Act 1989 complaints procedure.[244]

239 SEND Code, para 10.20.

240 SEND Code, para 10.67.

241 Under the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015 SI No 358. The 13 pilot authorities are listed in the schedule to these regulations. See further, paras 11.74–11.82.

242 Under the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 SI No 1306.

243 SEND Code, para 11.5.

244 SEND Code, paras 11.105–11.111.

Timescales for assessments and providing services

3.128 As noted above (para 3.34), *Working Together* requires social care assessments to be completed in a timely manner with an outside timeframe of 45 working days. Where delay occurs either in the assessment or the provision of services, then the complaints process may be invoked (see para 11.8) since this will at least put the process on a fixed timescale (ie that for investigating the complaint).

3.129 In relation to the provision of services, the common law requires that these be provided within a 'reasonable time'. 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.[245] 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. As the 2015 iteration of *Working Together* noted: 'For children who need additional help, every day matters'.[246]

3.130 The LGO has investigated a considerable number of complaints concerning delayed assessments relating to home adaptations (see chapter 6). In a 1996 report,[247] 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.[248] In this complaint, the 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: 'If 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

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

246 *Working Together* (2015), p7, para 10. This text does not appear in the 2018 version of the guidance.

247 Complaints nos 93/B/3111 and 94/B/3146 against South Bedfordshire DC and Bedfordshire CC.

248 Complaints nos 94/C/0964 and 94/C/0965 against Middlesbrough DC and Cleveland CC.

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).[249]

3.131 In general, if the shortage is due to a budgetary problem, it will not be an acceptable excuse – as the court has noted:[250]

> 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.

Delay and interim provision

3.132 The duty on local authorities is to meet the eligible needs of disabled children and their families – and this will frequently necessitate the support being provided prior to the completion of an assessment. A 2000 guidance document[251] made this point forcefully by criticising those councils that regarded assessments as an 'event rather than as a process and services were withheld awaiting the completion of an assessment'. The same guidance highlighted the need for 'action' in such cases – that 'services should be provided according to the needs of the child and family, in parallel with assessment where necessary, and not await completion of the assessment'.[252] This requirement is re-emphasised in the 2018 *Working Together* guidance. Having referred to the maximum timeframe of 45 working days, it states that:

> Whatever the timescale for assessment, where particular needs are identified at any stage of the assessment, social workers should not wait until the assessment reaches a conclusion before commissioning services to support the child and their family. In some cases the needs of the child will mean that a quick assessment will be required.[253]

249 *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119 at 128.

250 *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.

251 Department of Health, Department for Education and Employment and Home Office, *Framework for the assessment of children in need and their families (policy guidance)*, 2000.

252 Department of Health, Department for Education and Employment and Home Office, *Framework for the assessment of children in need and their families (policy guidance)*, 2000, para 1.56.

253 *Working Together*, p32, para 75.

3.133 The need for interim support pending completion of the care planning process was also stressed in the 2015 iteration of *Working Together* – that children's needs are paramount and that every child should receive 'the support they need before a problem escalates'.[254]

The need for services to promote dignity

3.134 All support services provided by local authorities for disabled children and their families (including for 'accommodated children' – see following section) must comply with the obligations under the ECHR: the essence of which is the promotion and protection of the inherent dignity of all those in need. In *R (A, B, X and Y) v East Sussex CC (No 2)*,[255] 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].

3.135 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

3.136 Disabled children may require accommodation from a local authority on either a long-term or a short-term basis. As noted above (see para 3.79), 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 support service under Children Act 1989 s17. However, if the placement arises because 'the person who has been caring' for the disabled child is 'prevented . . . from provid-

254 *Working Together* (2015), p8, para 12. This text does not appear in the 2018 iteration of the guidance.

255 [2003] EWHC 167 (Admin); (2003) 6 CCLR 194.

ing him with suitable accommodation or care' for whatever reason, then the care is provided under a different section of Children Act 1989, namely section 20(1). This distinction is important, because the duty to provide accommodation under Children Act 1989 s20(1) is a 'specifically enforceable' duty[256] and a child accommodated under this duty may well become 'looked-after' by a local authority (see para 3.145).[257] Residential short breaks may also be provided under the authority's power to accommodate pursuant to Children Act 1989 s20(4) – but only if the qualifying criteria for the section 20(1) duty are not met on the facts of the individual case. Indeed the statutory guidance on short breaks presumes that overnight breaks will be provided under the power to accommodate in s20(4) rather than the duty in section 20(1).

3.137 In *R (G) v Southwark LBC*,[258] the House of Lords confirmed that where the qualifying criteria in Children Act 1989 s20(1) are met (considered below), an authority is under a specific duty to accommodate a child under that section. This duty trumps the power to accommodate a child under Children Act 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 Children Act 1989 s17. It will constitute maladministration if a local authority fails to undertake an assessment in relation to its Children Act 1989 s20(1) duty in an appropriate case – for example, in relation to a disabled child whose mother is unable to cope with his challenging behaviour and wants the local authority to accommodate him.[259]

3.138 As noted above (see para 3.58), the High Court held in *R (JL) v Islington LBC*[260] that the 'prevention' referred to in Children Act 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 para 4.187), it will therefore be a question of fact as to whether the placement is made pursuant to section 20(1).

256 See para 2.47 above.

257 This arises if the child is in local authority care by reason of a court order or is being accommodated under Children Act 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).

258 [2009] UKHL 26; (2009) 12 CCLR 437.

259 Report on complaint no 13/010/519 against Birmingham City Council, 31 March 2014.

260 [2009] EWHC 458 (Admin); (2009) 12 CCLR 322.

3.139 It follows that the Children Act 1989 s20(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). For example, in *G v Kent CC*[261] the court held that the local authority had not discharged its section 20(1) duty where the only rational conclusion was that the child's parents were prevented from providing him with suitable accommodation on a full-time basis. 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.

3.140 It is important to bear in mind that accommodation under Children Act 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 (Children Act 1989 s20(7)).[262] The parent retains full 'parental responsibility' (see para 2.58) and may remove their child at any time from a local authority's accommodation (section 20(8)). This was emphasised by the Supreme Court in *Williams and another v Hackney LBC*.[263] A delegation of parental responsibility to the local authority under section 20 must be 'real and voluntary',[264] and where a parent unequivocally requires the return of a child accommodated under section 20, the local authority has no power under that section to continue to accommodate the child. However, a delegation of responsibility can be real and voluntary without being fully 'informed'. While the 'best way' to ensure that delegation is real and voluntary is by informing the parent of his or her rights to object, or to request the return of his or her child, this is not a strict legal requirement.[265]

3.141 The Supreme Court also clarified in *Williams and another v Hackney LBC* that section 20 can be used for long-term placements where this

261 [2016] EWHC 1102 (Admin); [2016] E.L.R. 396 at [102].

262 Unless the child is 16 or over and agrees to be provided with accommodation under this section: Children Act 1989 s20(11). Real and voluntary delegation will also not be required where there is no person of capacity with parental responsibility (*Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam) [2013] 2 FLR 987 per Hedley J at [27].

263 [2018] UKSC 37; (2018) 21 CCLR 589.

264 At [39].

265 At [39].

would be consistent with the local authority's other duties.[266] This means that a local authority would have no basis for threatening care proceedings because of a perceived limit on the length of time for which a child may be accommodated under section 20.

3.142 Before providing accommodation, an authority must give due consideration to the wishes and feelings of the child, although these may not be determinative.[267] Authorities must additionally consider the child's wishes and feelings throughout any placement. Accordingly, in *R (CD) v Isle of Anglesey CC*,[268] 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'.

3.143 In relation to children accessing overnight or residential short breaks, it should be remembered that these arrangements only engage the Children Act 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 Children Act 1989 s17 or s20(4).

3.144 Where a local authority accommodates a disabled child outside their area, the placing authority retains responsibility for that child for the duration of the placement: Children Act 1989 s105(6).

Duties towards 'looked-after' disabled children

3.145 A disabled child who is accommodated under the Children Act 1989 s20(1) duty (or indeed the section 20(4) power)[269] may become a 'looked-after' child for the purposes of the Children Act 1989.[270] For this to apply, all that is required is that the accommodation is provided for a continuous period of more than 24 hours (Children Act 1989 s22(2)). As noted above (para 3.88), a modified form of 'looked-after' status applies to disabled children receiving residential short

266 At [49].

267 *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].

268 [2004] EWHC 1635 (Admin); (2002) 7 CCLR 589.

269 But not under Children Act 1989 s17.

270 Children Act 1989 s22(1)(b).

breaks in a single setting for a limited period of time. A local authority does not acquire parental responsibility for children it is voluntarily accommodating – responsibility remains with the child's mother or parents (Children Act 1989 s2).

3.146 Local authorities do, however, have additional duties towards disabled children who are 'looked after' (as they do to all 'looked-after' children), including duties in relation to accommodation and maintenance.[271] In particular, there is a 'specific' duty (see para 2.47) on local authorities to safeguard and promote the welfare of the children they look after.[272] Local authorities must ascertain and give due consideration to their wishes and feelings when making decisions for looked-after children.[273] Furthermore, under Children Act 1989 s22C[274] authorities accommodating a looked-after child have to:

- place the child in what is, in their opinion, the most appropriate placement available;[275]
- place the child within the local authority's area, unless that is not reasonably practicable;[276] 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.[277]

3.147 Placements of children away from home are governed by the Care Planning, Placement and Case Review (England) Regulations 2010

271 Children Act 1989 ss22A–22C.

272 Children Act 1989 s22(3)(a).

273 Children Act 1989 s22(4)–(5).

274 Substituted, together with ss22A, 22B, 22D–22F, for s23 as originally enacted, by Children and Young Persons Act 2008 s8(1).

275 Children Act 1989 s22C(5). This duty applies if it is not reasonably practicable and/or consistent with the child's welfare to place the child with a parent, a person with parental responsibility or a person named in a child arrangements order: section 22C(3)–(4). In *R (Nationwide Association of Fostering Providers) v Bristol CC* [2015] EWHC 3615 (Admin); [2016] PTSR 932 ('*NAFP*'), the court held that this duty only related to the *type* of placement, not the individual placement for the child; judgment at [55]–[58]. However, none of the parties in that case agreed with this interpretation (see [56]) and the judgment has not been followed in future cases, so if the issue arises again the court may take a different view. Indeed, in *R (A) v LB Haringey LBC* [2016] EWHC 3054 (Admin); (2017) 20 CCLR 60 the Deputy Judge (Timothy Straker QC) appears to have doubted the correctness of the approach in *NAFP*, albeit without needing to decide the issue (see [33]).

276 Children Act 1989 s22C(9).

277 Children Act 1989 s22C(8).

('the 2010 Regulations').[278] Generally, under the 2010 Regulations, where a child becomes 'looked-after', the local authority must:

- assess the child's needs for services to achieve or maintain a reasonable standard of health or development and prepare a care plan;[279]
- ensure that a registered medical practitioner assesses the child's state of health and provides a written report of that assessment as soon as reasonably practicable;[280]
- prepare a placement plan setting out how the placement under Children Act 1989 22C will contribute to meeting the child's needs;[281]
- ensure that visits are made to the child at the child's placement by the local authority's representative within one week of the start of the placement, at intervals of not more than six weeks for the first year of any placement, and thereafter:
  - where the placement is intended to last until C is aged 18, at intervals of not more than three months, and
  - in any other case, at intervals of not more than six weeks;[282]
- carry out a review of the child's case within 20 working days of the date on which they become looked-after, with a second review to take place not more than three months after the first and subsequent reviews at intervals of not more than six months.[283]

3.148 The detailed requirements of the 2010 Regulations are themselves expanded upon by the 'Volume 2' Children Act statutory guidance.[284]

278 SI No 959.

279 2010 Regulations reg 4. See reg 5 and Sch 1 for the detailed requirements of the content of the care plan for 'looked-after' children and reg 6 for the process requirements.

280 2010 Regulations reg 7.

281 2010 Regulations reg 9. The plan must cover all the matters specified in Sch 2 to the 2010 Regulations. If it is not reasonably practicable to prepare the placement plan before making the placement, the placement plan must be prepared within five working days of the start of the placement: reg 9(2). Under reg 14, a placement may generally only be terminated following a formal review of the child's case in accordance with 2010 Regulations Part 6.

282 2010 Regulations reg 28.

283 2010 Regulations reg 33. Pursuant to reg 32, no significant change should be made to the child's care plan unless this change has been considered at a review, unless this is not reasonably practicable.

284 HM Government, *The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review*, June 2015 ('Volume 2 Guidance'). There is also statutory guidance issued in March 2015 entitled *Promoting the health and well-being of looked-after children*.

Detailed reference to this guidance will be essential in any case involving a looked-after child. Guidance with particular relevance to disabled children becoming looked-after includes:

- In drawing up a health plan[285] for a disabled child, consideration must be given to continuity of specialist care.[286]
- A thorough assessment of the child's disability-related needs must be undertaken to ensure that any requirements necessary for his/her accommodation are identified and arrangements made to ensure the suitability of that accommodation.[287]
- Foster carers can provide a disabled child with 'an important opportunity to live in his/her local community rather than be placed in more traditional forms of residential care which may be some distance from home'.[288]
- In all types of placement:

  > . . . disabled children must have access to the same facilities such as recreation, living or garden areas, as other non-disabled children in the home and this will form an important criterion as to whether the accommodation is suitable.[289]

Support for 'accommodated children'

3.149 Children Act 1989 ss85–86 require that where children are provided with accommodation otherwise than under the social care powers and duties (for example, by an NHS body or the local authority's education department) for a significant period, the relevant children's services department must be notified.

3.150 Children Act 1989 Sch 2 para 8A[290] provides that: 'Every local authority shall make provision for such services as they consider appropriate to be available with respect to accommodated children'.[291] These services must be provided 'with a view to promoting contact

285 The health plan 'forms the health dimension of the care plan': para 2.16. The care plan will also include a personal education plan; see the SEND Code, para 10.6.

286 Volume 2 Guidance, June 2015, para 2.63.

287 Volume 2 Guidance, June 2015, para 3.26.

288 Volume 2 Guidance, June 2015, para 3.28.

289 Volume 2 Guidance, June 2015, para 3.29.

290 Inserted by Children and Young Persons Act 2008 s19.

291 Children Act 1989 Sch 2 para 8A(1). See also Children Act 1989 Sch 2 para 10 for the obligation on local authorities to support all children 'in need' living apart from their families to live with their families or achieve greater contact with them, where this is necessary in order safeguard and promote their welfare.

between each accommodated child and that child's family'.[292] The particular services which can be provided include advice, guidance and counselling, services necessary to enable the child to visit, or to be visited by, members of the family and assistance to enable the child and members of the family to have a holiday together.[293]

Duties towards disabled children 'leaving care'

3.151 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.

3.152 'Eligible' children are those who are 16 or 17 years old and have been 'looked-after' for 13 weeks from the age of 14, either continuously or in total.[294] 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;[295]
- appoint a personal adviser to co-ordinate services,[296] who must be independent of the authority and not the person with responsibility for the assessment or pathway plan: *R (J) v Caerphilly CBC*.[297]

The pathway plan 'must include any services being provided in respect of the young person's disability'.[298]

3.153 'Relevant' children are children aged 16 or 17 years old who have ceased to be 'looked-after' but otherwise would have been 'eligible'.[299]

292 Children Act 1989 Sch 2 para 8A(3).

293 Children Act 1989 Sch 2 para 8A(4). See further CSDPA 1970 s2(6)(f) and para 3.78 above for the specific duty to support disabled children to have holidays.

294 Children Act 1989 s19B; and 2010 Regulations reg 40.

295 Children Act 1989 s19B; and 2010 Regulations reg 41. The assessment should be completed within three months of the child reaching 16 or them becoming an eligible child after that age: 2010 Regulations reg 42. See 2010 Regulations Sch 8 for the detailed requirement of the pathway plan.

296 See 2010 Regulations reg 44 for the functions of the personal adviser.

297 [2005] EWHC 586 (Admin); (2005) 8 CCLR 255.

298 HM Government, *The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review*, March 2010, para 5.17.

299 Children Act 1989 s23A.

Children's services authorities have a duty to 'keep in touch' with relevant children and prepare pathway plans for them.

3.154 'Former relevant' children are young people who are over 18 but were previously 'eligible' or 'relevant' children.[300] Duties towards former relevant children are discussed in para 10.57, where the 'leaving care' scheme is generally given more detailed consideration. The key guidance for young people 'leaving care' is the 'Volume 3' Children Act guidance.[301]

3.155 These duties sit alongside other duties in relation to disabled young people's social care needs, for example, the duty to maintain an EHC plan up to the age of 25 and the duties owed during and after the transition to adulthood under the Care Act 2014. These wider duties are covered in more detail in chapter 10 on transition to adulthood. In the opinion of the authors, the scheme lacks coherence, with too many overlapping obligations and a lack of clarity as to which takes precedence.

Charging for children's services

3.156 Children's services authorities have the power to charge for services provided under the Children Act 1989. Authorities may recover 'such charge as they consider appropriate' (Children Act 1989 s29(1)) and, in so doing, if the child is under 16, can take into account 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)).

3.157 Children's services authorities can also charge for services provided under CSDPA 1970 s2. In practice (at the time of publication), few authorities do charge parents or children for services provided either under Children Act 1989 Part III or CSDPA 1970 s2.[302]

300 Children Act 1989 s23C.

301 Department for Education, *The Children Act 1989 guidance and regulations Volume 3: planning transition to adulthood for care leavers*, revised January 2015.

302 See L Clements and P Thompson, *Community Care and the Law*, 4th edn, LAG, 2007, paras 24.68–24.73 (not in current edition).

Safeguarding and child protection

3.158 Local authorities have extensive powers and duties under Children Act 1989 to protect children from harm. A key threshold for these powers and duties to arise is set out in Children Act 1989 s47, being that the local authority has reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm. It is vitally important that this safeguarding threshold is kept distinct from the far lower threshold described above at para 3.56 where it is 'necessary' to meet a disabled child's needs, or the even lower threshold for when a disabled child is 'in need' and entitled to a statutory assessment (see para 3.30). In *R (O) v Peterborough City Council*,[303] a local authority's decision to make an autistic child who was refusing to eat or drink the subject of a child protection plan was quashed by the court, because the local authority had either failed to understand the concept of neglect, or its conclusion was irrational because there was no evidence of neglect on the part of the parents.

3.159 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 Children Act 1989 Part III, which is that 'local authorities should provide support for children and families'.[304]

3.160 In *A local authority v A (a child)*,[305] Munby LJ made a number of observations about heavy-handed interventions by local authorities who believed that they were not merely 'involved' with such families but that they had 'complete and effective control . . . through [their] assessments and care plans'. Of this attitude, Munby LJ observed that 'it needs to be said in the plainest possible terms that this suggestion,

303 [2016] EWHC 2717 (Admin); (2016) 19 CCLR 548 at [48].

304 *R (M) v Gateshead MBC* [2006] EWCA Civ 221; (2006) 9 CCLR 337 per Dyson LJ at [42].

305 [2010] EWHC 978 (Fam); (2010) 13 CCLR 404, at paras 50–51.

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.

3.161 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.[306] The LGO has also expressed concern about local authorities seeking to use their child and adult protection powers inappropriately. A 2008 ombudsman complaint[307] 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

306 [2010] EWHC 978 (Fam); (2010) 13 CCLR 536 at [55].

307 Complaint no 07/B/07665 against Luton Borough Council, 10 September 2008.

putting him at risk. The ombudsman held that it 'beggars belief that the referral was made at all'.[308] In similar vein, a 2009 ombudsman complaint[309] concerned a mother who (because of a service failure by the council) had no option but to use a hose in the back garden to keep her sons clean. Instead of being provided with 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.[310]

3.162 The proper procedures to be followed in relation to safeguarding children (including disabled children) can be found in the *Working Together* statutory guidance considered in detail earlier in this chapter in relation to the duty to assess disabled children as children 'in need'. The guidance sets out how organisations and individuals should work together to safeguard and promote the welfare of children and young people in accordance with the Children Act 1989 and the Children Act 2004. The general principles in the statutory guidance are also supplemented by specific practice guidance in relation to disabled children.[311]

3.163 *Working Together* mandates that the same approach to assessment should apply to all child cases, including those of children 'at risk'. The emphasis is on effective action to safeguard children:

> The local authority should act decisively to protect the child from abuse and neglect including initiating care proceedings where existing interventions are insufficient.[312]

This is undoubtedly correct, however in the context of disabled children it is vitally important that local authorities distinguish between cases of potential abuse or neglect and cases where families are simply struggling as a result of a failure to discharge the support duties outlined above. In particular there is no time limit for the provision of accommodation to a disabled child under Children Act 1989 s20 (see para 3.136 above) and so it is not necessary for care

308 Complaint no 07/B/07665 against Luton Borough Council, 10 September 2008, para 37.

309 Complaint no 07/C/03887 against Bury MBC, 14 October 2009.

310 Complaint no 07/C/03887 against Bury MBC, 14 October 2009, paras 40 and 43.

311 DCSF, *Safeguarding disabled children – Practice Guidance*, 2009.

312 *Working Together*, p26, para 47.

proceedings to be commenced simply because a disabled child has been accommodated for a particular period. Although there are 'bound to be cases where that should include consideration of whether or not the authority should seek to take parental responsibility for an accommodated child by applying for a care order'[313], there may well be other cases where this would be inappropriate. The key principle, as emphasised by Lady Hale in *Williams v Hackney LBC*,[314] is that: 'Section 20 must not be used in a coercive way: if the state is to intervene compulsorily in family life, it must seek legal authority to do so.'

3.164 The same requirement for a support plan focussed on outcomes is imposed by *Working Together* in child 'in need' and child 'at risk' cases.[315] However, in abuse or neglect cases the plan should be reviewed regularly both to see whether sufficient progress has been made to meet the child's needs and on the level of risk faced by the child.[316] The guidance highlights that prompt action may be required in certain cases. In addition to the general requirement for an initial decision on the type of response required within one working day of a referral, there is a specific requirement imposed by Children Act 1989 ss44 and 46 for action to be taken by the social worker, the police or the National Society for the Prevention of Cruelty to Children (NSPCC) in cases where removal of the child may be required.[317] These 'immediate protection' cases are addressed in the guidance, including a process flowchart.[318] Guidance on the 'strategy discussion' required in cases where it is thought the Children Act 1989 s47 threshold[319] may be crossed is provided.[320] There is also guidance on how to carry out section 47 enquiries and the potential outcome of section 47 enquiries.[321] There then follows detailed guidance on child protection arrangements which are beyond the scope of this book.

313 *Williams and another v Hackney LBC* [2018] UKSC 37; (2018) 21 CCLR 589.
314 [2018] UKSC 37; (2018) 21 CCLR 589 at [51].
315 *Working Together*, pp30–31, paras 63–68.
316 *Working Together*, p30, para 66.
317 *Working Together*, p32, para 74.
318 *Working Together*, p33.
319 See above para 3.158.
320 *Working Together*, pp39–41.
321 *Working Together*, pp43–46.

Transition to adult social care

3.165 The scheme governing care and support for disabled adults and support for their carers established by the Care Act 2014 is addressed in chapter 10. This scheme creates three new types of transition assessment – a child's needs assessment,[322] a child's carer's assessment[323] and a young carer's needs assessment.[324]

3.166 The Care Act 2014 (by amendment of the Children Act 1989 and the CSDPA 1970) also creates an unusual set of duties on local authorities to continue to provide children's services to a disabled young person after the age of 18 if the Care Act 2014 transition assessment process has not been completed at the right time. These duties comprise:[325]

- Children Act 1989 s17ZH, which requires that services provided under Children Act 1989 s17 must continue once a disabled child or young carer turns 18 until adult services have: a) concluded that the individual does not have needs for care and support or for support; b) begun to meet identified needs; or c) concluded that they will not meet any identified needs, for example because they do not meet the eligibility criteria.
- Children Act 1989 s17ZI, which requires that where social care services are being provided as part of an EHC plan and that plan ceases to be maintained, children's services must continue until any of the situations identified at a)–c) above are reached (ie the adult care and support process is finalised).
- CSDPA 1970 s2A, which requires that CSDPA 1970 services must also continue until any of the situations identified at a)–c) above are reached.

3.167 Care Act 2014 s66 is therefore an important mechanism to ensure that a disabled young person's transition from children's services to adult services is not a 'cliff edge'; that children's services can continue until it is appropriate for the baton to be passed to adult services. As the *Care and Support Statutory Guidance* explains:

322 Care Act 2014 ss58–59; see para 10.30.

323 Care Act 2014 ss60–61; see para 10.40. Care Act 2014 s62 creates a power to meet the needs of carers of young people in transition to adulthood.

324 Care Act 2014 s64; see para 10.45.

325 Inserted by Care Act 2014 s66; and see also the *Care and Support Statutory Guidance*, 2018, chapter 16.

> . . . Under the Care Act 2014, if, having carried out a transition assessment, it is agreed that the best decision for the young person is to continue to receive children's services, the local authority may choose to do so. Children and adults' services must work together, and any decision to continue children's services after the child turns 18 will require agreement between children and adult services. . . .[326]

3.168 The Care Act 2014 guidance states[327] that in cases where a young person is continuing to receive children's services over the age of 18, any safeguarding concerns should be addressed through adult safeguarding arrangements under the Care Act 2014 scheme.

326 *Care and Support Statutory Guidance*, 2018, para 16.72.
327 *Care and Support Statutory Guidance*, 2018, para 14.5.