

Disabled Children, Carers & social care law

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Definitions

Children Act 1989 ~ Disabled child

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; and in this Part—

- ‘development’ means physical, intellectual, emotional, social or behavioural development; and
- ‘health’ means physical or mental health.

– **Section 17 (11) Children Act 1989**

Children Act 1989 ~ carers

A **young carer** is "a person under 18 who provides or intends to provide care for another person" (but excluding paid / formal volunteers)

Section 17 (ZA) Children Act 1989

A **parent young carer** is "an adult 'who provides or intends to provide care for a disabled child for whom the adult has parental responsibility"

Section 17 (ZA) Children Act 1989

Question

What about adults who provide care for disabled children but don't have parental responsibility for them?

Adult carers without parental responsibility

Carers (Recognition and Services) Act 1995

an individual who 'provides or intends to provide a substantial amount of care on a regular basis for the disabled (but excluding paid / formal volunteers)

Section 1(2)(b)

CSDPA 1970

Disabled child has same meaning as in Children Act 1989 s17(11)

Equality Act 2010

Disabled person who

- (a) ... has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities.

Section 6

Includes associative discrimination (ie treating a carer less favourably because of she is caring for a disabled child) –

Section 13 and see Coleman v. Law (2008)

European Convention on Human Rights

No definition

Little case law concerning the rights of disabled children
Substantial case law on adults with disabilities

- Institutional care
- Harassment – ie *Đorđević v. Croatia* (2012)

Considerable case law on children being taken into care because parents have a disability - *Kutzner v. Germany* (2002) *Kocherov v. Russia* (2016) *Re C (A Child)* [2014] EWCA (Civ Div)

Care Act 2014

The Care and Support (Eligibility Criteria) Regulations 2015.

carrying out any caring responsibilities the adult has for a child

- LAs should consider any parenting or other caring responsibilities the person has. The adult may for example be a step-parent with caring responsibilities for their spouse's children.

Bristol CC v. S (2015)

Inter-relationship of social care legislation for disabled children

Legislation

Children Act 1989 Part 3 (sections 17 – 30);
Chronically Sick and Disabled Persons Act 1970
Children & Young Persons Act 2014,
Breaks for Carers of Disabled Children
Regulations 2011 SI No 707.
Care Act 2014
Mental Health Act 1983 s117

Children Act 1989

Section 17(1)

- General duty to provide a 'range' of services to safeguard & promote the welfare of children in need

MUCH amended - eg

- Carers and Disabled Children Act 2000 amended to provide right to direct payments;
- Children and Young Persons Act 2008 amended to insert 'short breaks' duty
- Children and Families Act 2014 amended to provide for parent carers and young carers

Children Act 1989

Section 17

- Includes home & community based support ;
- Includes accommodation and cash (s17(6))
- Includes direct payments (s17A)
- Can be provided for family members (s17(3))
- Includes services listed in Sch 2 Pt 1 (s17(2)) ;

Children Act 1989 Sch 2 Part 1

Support includes (para 8):

- advice, guidance and counselling;
- occupational, social, cultural or recreational activities;
- home help (which may include laundry facilities);
- facilities for, or assistance with, travelling to and from home for the purpose of taking advantage of any other service provided under this Act or of any similar service;
- assistance to enable the child concerned and his family to have a holiday.

Children Act 1989

Accommodation under the CA 1989

Section 17

~ general respite care

Section 20

~ accommodated children



**Children
Leaving Care
entitlements**

Looked after children

A child is 'looked after' if (s22 CA 1989)

- in care; or
- accommodated under s20 CA 1989; or
- in respite care under s17 and any single respite care period lasts for more than 17 days or the total in one year exceeds 75 days

Short breaks duty

Children Act 1989 Schedule 2 part 1 para 6.

Duty to provide services designed—

- (a) to minimise the effect on disabled children within their area of their disabilities;
- (b) to give such children the opportunity to lead lives which are as normal as possible; and
- (c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.

Inserted by Children and Young Persons Act 2008

Short breaks duty

In performing their [short breaks] duty authorities must consider:

- (a) the needs of carers who would be unable to continue to provide care unless breaks were provided; and
- (b) the needs of carers who could provide care more effectively if breaks from caring were given, to allow them to—
 - (i) undertake education, training or 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.

Breaks for Carers of Disabled Children Regulations 2011

Chronically Sick & Disabled Persons Act 1970

Section 2(6)

Non-accommodation services

- Specific duty to provide these services if identified as necessary
- Non-resource dependent duty;
- CSDPA trumps the CA 1989 & Short Breaks provisions if here is a choice
- Services provided under s2(6) are provided *in exercise of a local authorities functions under Part 3 of the Children Act 1989*

Chronically Sick & Disabled Persons Act 1970

- (a) practical assistance in the home
- (b) wireless TV, library etc.
- (c) lectures, games outings and other recreational/educational facilities
- (d) assistance in travelling to community based care services
- (e) home adaptations
- (f) holidays
- (g) meals (at home or elsewhere)

Care Act 2014

Applies to 'adults in need' and adult carers

However:

- The Act contains specific responsibilities for 'transitions' involving a person becoming an adult;
- Where an 'adult in need' is caring for a child, this responsibility is relevant;
- Where an 'adult carer' is caring for a child (in addition to an adult) this responsibility is relevant;

Mental Health Act 1983 s17

Patients detained under:

- s3 MHA 1983
 - (or a criminal provisions)
- when discharged
- after care services under s117 MHA;
 - Joint NHS / social services duty.

Assessing needs

Assessing need

“What if”

- What will happen if care and support is not available?
- The greater the risk to the person’s well-being the greater the onus is on the LA to meet that need – or to give cogent reasons as to why this is not necessary.
- Well-being includes physical, mental, social and emotional well-being as well as the ability to engage in employment, education, training, leisure and social activities.

Disabled child

No duty specific duty in the CA 1989

- In *R (G) v. Barnet LBC* (2003) held that such a duty had to be inferred;
- Where preparing an EHC Plan there is a specific duty to assess social care support needs (ie under the CA 1989 and the CSDPA 1970);
- *Working Together* (2015) 'policy guidance';

Working Together (2015)

The purpose of an assessment is:

- 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 (p19, para 29).
- Every assessment should be focused on outcomes, deciding which services and support to provide to deliver improved welfare for the child'
- A decision on the type of response to be made within 1 working day;
- Maximum time frame is 45 working days

Parent carers

Children Act 1989 s17ZD

Duty to assess a parent carer 'on the appearance of need'

- The assessment must have regard to the well-being of the parent carer;
- "well-being" has same meaning as in Care Act 2014.

Well-being

relates to:

- (a) personal dignity
- (b) physical /MH /emotional;
- (c) protect abuse /neglect;
- (d) control day-to-day life;
- (e) work, education, training;
- (f) social & economic;
- (g) personal relationships;
- (h) suitable accommodation;
- (i) contribution to society.

regard to—

- (a) individual is best placed;
- (b) views, wishes and feelings;
- (c) all the circumstances;
- (d) participate in decisions
- (e) a balance between individual's and carers;
- (f) Protect abuse/ neglect;
- (g) minimum restrictions.

PC's also caring for an adult

Right to a Care Act 2014 assessment (s10)

- Care need not be 'regular or substantial'
- Duty to meet eligible needs
- Care Act Eligibility Criteria Regulations include:
 - carrying out any caring responsibilities the carer has for a child

Divya example (p196 Statutory Guidance)

- Caring for father who has a DP and her 4 children:
- Divya received a carers' direct payment, which she uses for her children to attend summer play schemes so that she get some free time to meet with friends and socialise.

Young carers

Children Act 1989 s17ZA

Duty to assess a young carer 'on the appearance of need'

- Detailed assessment regulations;
- Young Carers' (Needs Assessments) (England) Regulations 2015

YC Assessment regs

Duty to consider

- the YC's age, understanding and family circumstances;
- the wishes, feelings and preferences of the young carer;
- differences of opinion between YC, YC's parents and the person cared for, concerning the care provided; and
- the outcomes the YC seeks from the assessment.
- young carer's wishes to participate in education, training, recreation, work.

YC Assessment regs

Duty to consider

- amount, nature and type of care provided;
- extent to which this care is relied upon by the family
- impact on YC's well-being, education & development;
- extent to which the care is inappropriate
- if needs can be prevented by providing services to—
- the person cared for, or
- another member of the young carer's family;
- what YC's support needs would be if relieved of the tasks;
- other assessments of YC / person cared for;
- if YC is a child in need;
- actions to be taken as a result of the assessment;
- the arrangements for a future review.

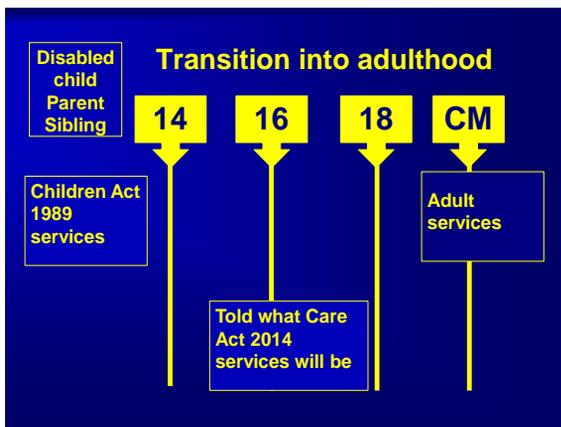
Care & Support Planning

What the assessed need are

How the need is to be met

- the level & frequency of the help that is to be provided;
- who is going to provide it;
- which agency is responsible for what service;
- what the objectives of are providing help (outcomes);
- when is the care being provided (times / days / dates);
- what the carers are willing to do;
- who is the coordinator and their contact number;
- who to contact in emergencies;
- what the contingency plan is if things go wrong;
- who is monitoring the plan;
- When the review is to happen.

Transitions new Care Act 2014 provisions



Transitions ~ Care Act 2014 ss 58 - 59

General formula

Where it appears to a LA that:

1. it is 'likely' that [person] will have care & support needs after transition
2. it to be of significant benefit to be assessed;
Must assess (with consent / BI assessment)
LA must give reasons if it refuses to assess

Transitions ~ at 18

- LA must decide whether to treat the assessment as a needs assessment under the 2014 Act.
- Must consider when the it was carried out and if any of the circumstances have changed
- **The Statutory Guidance** (para 16.64) where it is decided that the YP's or carer's needs are to be met under the Care Act the authority must 'undertake the care planning process as for other adults – including creating a care and support plan and producing a personal budget'

Transitions ~ at 18

CA 1989 s17ZH enables the Children Services & Adult Services to decide the best time to transfer when is best transfer their respective responsibilities.

SEND Code states (para 8.67):

- Under no circumstances should young people find themselves suddenly without support and care as they make the transition to adult services. Very few moves from children's to adult services will or should take place on the day of someone's 18th birthday.

Transitions ~ at 18

CA 1989 s17ZH ~ LAs can continue to provide services under CA 1989 s17 and/or CSDPA 1970 s2 even though the young person has reached the age of 18.

Statutory Guidance (para 16.67)

- families must not faced with a gap in provision of support on the 18th birthday - if by that date the necessary support not in place then the existing services must be continued until the 'relevant steps have been taken'

Education, Health & Care Plans and Social care duties

Direct Payments

Direct Payments

Direct Payment Person
ASSESSED as
entitled to services

Must be used only for assessed needs

Certain excluded service

NB payments to family members

Amount of payment

- the direct payment should be sufficient to enable the recipient lawfully to secure a service of a standard that the local authority considers is reasonable to fulfil the needs for the service to which the payment relates.

Personal Budget

No requirement for disabled children to have a PB ergo ~ no need for a RAS to generate a figure

PB must always be sufficient to meet eligible care and support needs;

- The expectation that PBs will change as the care and support planning process progresses.
- Start with an 'indicative amount';
- 'regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency' (Care Act guidance para 11.24).

Personal Budget

Local Government Ombudsman

- Profoundly disabled adult cared for by her mother who had her own health problems: she had eligible care needs for 9 of the 10 outcomes.
- LA assessed a need for 52 wks care a year including 6 weeks respite care. Residential respite not appropriate so the respite funding used for extra home support.
- LA provided a PB of £849.57 a week to meet her eligible care needs which contained detailed costing as to how calculated and a PB of £659 a week for respite care with no calculations.

Personal Budget

Local Government Ombudsman
Maladministration

- LA had failed to explain how £659 was enough to meet the daughter's need for respite care
- Had adopted a "one size fits all" approach to people with physical disabilities .

Complaint against Kent CC 13/12/2016 para 18

Young People with 'high functioning' conditions

Disabled child

The CA 1989 and the CSDPA 1970 definitions of a disabled child state that it includes a child who:

- *'suffers from mental disorder of any kind'*

MHA 1983 s1(2) defines mental disorder as:

- *'any disorder or disability of the mind'*

Discussion

NHS Continuing Care and young people

Key issues

1. An area regulated by the law;
2. The law gives only a general 'steer' as to where the boundary lies;
3. Accordingly decisions of the court and Ombudsmen important - the '*benchmark cases*';

Legal regulation

Example

s275(1) NHS Act 2006 (interpretation)
"illness" includes mental disorder and any injury or disability requiring medical or dental treatment or nursing,

s1(2) Mental Health Act 1983
"mental disorder" means any disorder or disability of the mind;

s22 Care Act 2014

Ende Elements Training

A limit to social care provision

- LA may not meet needs under the CA 2014 if those needs are required to be met under the NHS Act – unless
 - The provision falls within the *Coughlan* criteria

But - nothing in the CA 1989 that prohibits social services providing healthcare

Coughlan (1999)

Ende Elements Training

- She is tetraplegic;
- doubly incontinent,
- requiring regular catheterisation;
- partially paralysed in the respiratory tract,
- with consequent difficulty in breathing;
- and
- subject not only to the attendant problems of immobility but to recurrent headaches caused by an associated neurological condition

Coughlan (1999)

Ende Elements Training

The distinction between those services which can and cannot be so provided is one of degree which in a borderline case will depend on a careful appraisal of the facts of the individual case. However, as a very general indication as to where the line is to be drawn, it can be said that if the nursing services are:

Coughlan (1999)

- (1) merely incidental or ancillary to the provision of [social care] which a local authority is under a duty to provide [under the social care legislation] and

Coughlan (1999)

- (2) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide, Then they can be provided (by SS).

The Quantity / Quality test

Pointon 2004

- Advanced dementia, (ie 'some of the severe behavioural problems, which had characterised his illness during its earlier stage, had now diminished');
- Unable to look after himself;
- His wife cared for him at home.

Pointon 2004

- Mrs Pointon 'giving highly personalised care with a high level of skill ... nursing care equal if not superior to that that Mr Pointon would receive in a dementia ward'
- Complaint upheld: assessors had focused on acute care' rather than assessing the 'psychological needs of patients with illnesses such as dementia' (para 39)
- Severe psychological problems and the special skills required to nurse someone with dementia

R (T, D & B) v Haringey LBC (2005)

- Disabled child
- Tracheostomy (a tube in the throat) which needed, suctioning about three times a night.
- "It is quite common now for children who have tracheostomies to be discharged from hospital and cared for at home (para 5)
- Great Ormond Street Hospital provides training for parents in how to manage those requirements at home; the Claimant mother has been trained fully in those areas" (para 7)

R (T, D & B) v Haringey LBC (2005)

Mother argued that the respite care should be funded by social services and not the NHS.

Mr Justice Ouseley (para 61) (citing *Coughlan*)

- the provisions of the Children Act are not to be regarded in general as reducing or replacing the important public obligations ... set out in the [NHS Act]. I do not see that the impact there of section 21(8) of the NAA 1948 means that the principles enunciated were peculiar to that Act"

NHS Continuing Care

National Framework for Children and YP's Continuing Care 2016

2016 C&YP Framework

Problematic

- 'continuing care package will be required when a child or young person has needs arising from disability, accident or illness that cannot be met by existing universal or specialist services alone' (page 5).

Meaning?

2016 C&YP Framework

Problematic

- It does not explain what is in this package and who is responsible for it.
- The judgment in *Haringey* makes clear that this is a package of health and social care support provided by the NHS

Framework for Children & YP 2016

- Problematically the 2016 framework fails to distinguish between health / social care overlaps and health / education overlaps.
- There cannot be an overlapping responsibility to provide services between health and social services once a person has been held to be eligible for NHS CC,
- There can however be an overlap between health and education responsibilities.

Framework for Children & YP 2016

Para 15 it states:

- Children with complex needs may not only need support from health services. They may also have special educational needs, and need **support** from social care.

Framework for Children & YP 2016

'Support'

True – but children who are eligible for NHS CC funding, it is only possible if 'support' means:

- helping their family with the emotional problems of caring for a disabled children,
- providing carer's assessments,
- addressing any safeguarding concerns
- complying with the LAC regulations and
- the guidance where a child is in residential care .

Health social services interface

Once a child or YP is held to be eligible for NHS CC then all their health and social care services needs are the responsibility of the NHS.

This does not mean that social services 'walk away' as clearly they will continue to have non-service provisions responsibilities.

R (T, D & B) v Haringey LBC (2005)

- there is a broad distinction to be drawn between health and social care provision and 'the provisions of the Children Act are not to be regarded in general as reducing or replacing the important public obligations' which were identified in *Coughlan* (para 61);

R (T, D & B) v Haringey LBC (2005)

- the 'quality / quantity' test in *Coughlan* applied to children. The 'scale and type of nursing care' are 'particularly important as is the question of whether its provision is incidental or ancillary to the provision of some other service which the social services authority is lawfully providing, and whether it is of a nature which such authority can be expected to provide' (para 62);

R (T, D & B) v Haringey LBC (2005)

- the purpose of the care is important. 'From one viewpoint, the purpose of its provision is so that the mother can have a few nights of unbroken sleep per week or some time by herself a week or to look after T.

R (T, D & B) v Haringey LBC (2005)

- That could be seen as social care for the mother. But its nature and purpose is to provide medical care for D; the intention behind the provision of that medical care is her safety while her mother enjoys respite. There is nothing different in quality or care about the disputed provision'; (para 65)

R (T, D & B) v Haringey LBC (2005)

- although on a broad interpretation of s17(1) of the Children Act 1989 'to safeguard and promote the welfare of children by providing a range and level of services appropriate to' could cover what are essentially medical needs – but 'such an interpretation would turn the social services authority into a substitute or additional NHS for children.

R (T, D & B) v Haringey LBC (2005)

- That would be ... an impermissibly wide interpretation, creating obligations on a social services authority which are far too broad in the context of other statutory bodies and provisions covering the needs of children' (para 68).

Accommodated children

- Looked after children have the same rights to NHS CC funding as any other child.
- LA required to provide funding (and supervision) for a foster parent etc and for the cost of any social care accommodation (CA 1989 s20) but the NHS duty to provide services applies as with any other child.
- LA responsible for ensuring the child has an IRO (CA 1989 s25) & complies with its obligations under the LAC regs

NHS v Education overlaps

No 'Coughlan' type legal rule relating to education / NHS

Accordingly all children and YP eligible for NHS CC will have separate needs for education.

Children and Families Act 2014 s42(3) places unprecedented duties on health bodies in relation to children with an EHC plan.

NHS v Education overlaps

Section 42(3)

Any health care support specified in a children or YP's EHC Plan must be provided

ie that it is a specifically enforceable duty to provide.
