

MOVING INTO ADULTHOOD

Key Legal Issues and Developments

Oxfordshire Family Support Network conference

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Issues to Discuss (briefly!)

- Children and Families Act 2014 ('CFA')
- Care Act 2014
- Mental Capacity Act 2005
- Justice for LB and 'LB Bill'

CFA - Importance of s 19 principles

Section 19 CFA provides that:

In exercising a function under this Part in the case of a child or young person, a local authority... must have regard to...

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.

Applies to everything done under CFA

Strategic duties

- Section 25 – LAs must carry out functions with view to integrating education, health and social care provision
- Section 26 – duty to have joint commissioning arrangements (Code Ch 3)
- Section 27 – duty to keep education and care provision under review and consider sufficiency
- Sections 28, 29, 31 – co-operation duties

Health / Education / Social Care interface

- Key existing documents re social care / health
 - Working Together to Safeguard Children (2013)
 - Assessments of children in need in 45 working days
 - Immediate response in urgent cases
 - Requirement for child in need plan
 - National Framework for Children's Continuing Healthcare
 - Applies to 'complex' cases – inc behaviour
 - Multi-agency assessment / decision in 8 working days

Health / Education / Social Care interface

- EHC Plans – single document, but different duties to include provision and to provide it
- Section 37(2) - must include:
 - Special educational provision
 - ‘health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs’
 - See further Code at Ch 9.62

Health / Education / Social Care interface

- Section 37(2) re social care – must include:
 - For under 18s, any social care provision which must be made as a result of section 2 of the Chronically Sick and Disabled Persons Act (CSDPA)1970
 - Any other social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs

Health / Education / Social Care interface

- Duty to provide – section 42:
 - The local authority must secure the specified special educational provision for the child or young person.
 - If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.
 - No legal diff ‘secure’ and ‘arrange’ – same duty

Health / Education / Social Care interface

- Silent re social care – therefore CSDPA s 2 key
 - Duty to provide extensive list of services where necessary to meet needs
 - LA can take account of resources when deciding whether ‘necessary’ (not just desirable) to provide service
 - BUT once accepted to be necessary to provide service, must provide sufficient service to meet need
 - See (poor) summary in CoP at 9.137...

Health / Education / Social Care interface

- Residential short breaks
 - Only important social care service incapable of being provided under CSDPA s 2.
 - If family are in ‘actual crisis’ then may be a specific duty to provide breaks under Children Act 1989 s 20
 - Otherwise ‘general duty’ under Children Act 1989 s 17 – governed by rationality

Personal Budgets

- Already available in health and social care
- C&F Act extends to education
- Two key issues
 - whether a ‘direct payment’ will be available – section 49:
 - Personal Budget information must be provided (although new Regulations exempt services which cannot be disaggregated)
 - Direct Payment may be available
 - How much money will be offered...

Personal Budgets

- Relevant regulations:
 - Special Educational Needs (Personal Budgets) Regulations 2014
 - Community Care, Services for Carers and Children's Services (Direct Payments) Regulations 2009 (will be replaced by those made under the Care Act 2014)
 - National Health Service (Direct Payments) Regulations 2013

Personal Budgets

- In essence...
 - SEN – no DPs if to do so would cause adverse impact on other CYP with EHC Plans or making the DP would be an inefficient use of the LA resources – Reg 6 of the SEN PB Regs & CoP at 9.123
 - Social care – right to direct payment unless limited exceptions, primarily related to capacity of parent to manage money, apply
 - Health – power but currently no duty to make DP for any health service (inc to child's representative)

Personal Budgets

- Whether ‘notional’ budget or direct payment, an indicative figure can be generated through a **Resource Allocation System (RAS)**
 - CoP at 9.102; ‘The final allocation of funding budget **must** be sufficient to secure the agreed provision...’
 - CoP at 9.106; ‘Local authorities must consider each request for a personal budget on its own individual merits’.
- See *R (KM) v Cambridgeshire CC*
<http://www.bailii.org/uk/cases/UKSC/2012/23.html>

Local Offer

- C&F Act section 30
 - Requirement to publish information about provision expected to be available within and outside LA's area
 - Must consult and publish comments about local offer
 - In force from 1 September
- Regs 53-57 & Sch 2 SEN and Disability Regs 2014
 - Who to consult and involve
 - Requirements as to publication of comments
 - Requirements as to publication of Local Offer itself

Local Offer

- Code of Practice at Chapter 4
 - In setting out what they ‘expect to be available’, LAs should include provision which they believe will actually be available.
 - Two key purposes:
 - To provide clear, comprehensive & accessible information about the available provision and how to access it, and
 - To make provision more responsive to local needs and aspirations
 - Para 4.19 – review requirement includes sufficiency of provision
- How to make it more than just a directory?

Local Transition Plans

- Much of detail about transition to new system left to Local Authorities
- Statutory guidance - 'Transition to the new 0 to 25 special educational needs and disability system'
 - Each LA must have local transition plan by end Sept
 - Para 5.5-5.8 for requirements of the plan – order of transfer of statements, details of transfer review process (EHC assessment), arrangements for LDAs etc
 - Must be consultation with parents and CYP (as a result of section 19) in preparing the plan.

Mental Capacity

- General rule – once YP turns 16 parents can no longer make decisions for them
- BUT – section 80 CFA and Part 6 of the Regulations
 - YP aged 16 and other with capacity can decide for themselves
 - Parents can make decisions for YP who lack capacity up to age 25 (see Annex 1 of Code of Practice)
- Only applies to decisions under CFA – eg re EHC Plans

Mental Capacity (2)

General approach to mental capacity

- Section 2 MCA:

‘a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.’

- Section 3 MCA

- ‘unable’ includes inability to understand or ‘use or weigh’ information

- Section 4 MCA

- All acts and decisions must be in P’s best interests

School Transport

- ‘Eligible’ children aged 5-15 – duty to provide free, suitable transport (s 508B)
- Children aged under 5 or 16-17 – power to provide suitable transport – can charge (s 508C)
- Over 18s – duty to provide suitable transport – can charge (s 508F)
- Post-16 transport policy statement – s 509AA and AB

Cuts – Short Breaks

- Significant recent investment in short break care through *Aiming High for Disabled Children* programme
- Absolutely vital service – 8 in 10 families caring for a learning disabled family member at breaking point (Mencap research)
- Given level of expenditure now being targeted for cuts – e.g. potential £2m cut in Hampshire (subject to consultation)

Cuts – Short Breaks

- Relevant statutory duties
 - CSDPA 1970 s 2 – home-based (s 2(1)(a)) and community-based (s 2(1)(c))
 - CA 1989 s 17 and schedule 2, para 6(1)(c)
 - Provide services ‘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’.
 - Breaks for Carers of Disabled Children Regulations 2011
 - CA 2004 s 11 – safeguarding and promotion of children’s welfare in carrying out functions
 - CFA 2014 s 19 – ‘best possible outcomes’

Cuts – Short Breaks

- Ways to challenge cuts
 - Are the statutory duties being complied with
 - for individual CYP
 - generally?
 - Has there been ‘proper’ consultation?
 - When the policy was set, was due regard paid to the needs specified in the PSED (Equality Act 2010 s 149) – particularly the need to ‘advance equality of opportunity’?
 - *R (Bracking) v Secretary of State for Work and Pensions*
<http://www.bailii.org/ew/cases/EWCA/Civ/2013/1345.html>

Duties to parent carers

- Section 97 – parent carers’ needs assessments
 - Not yet in force (due in force 1 April 2015)
 - Inserts new sections 17ZD-ZF into CA 1989
 - Requires PCNA to be carried out either on request or where appearance of need (s 17ZD(3))
 - Must have regard to well-being of parent carer and need to safeguard and promote welfare of disabled child (s 17ZD(10))
 - May be combined with other assessments (s 17ZE(3))
 - Detail to be specified in regulations (s 17ZE(4))

Duties to parent carers

- Is there a new duty to provide services to parent carers?
 - Section 17ZF requires ‘consideration’ of PCNA
 - In particular:
 - Does the parent carer have needs for support in relation to their caring role?
 - Does the disabled child have needs for support?
 - Could those needs be satisfied by services provided under section 17?
 - Must then decide ‘whether or not to provide any such services in relation to the parent carer or the disabled child’

Duties to parent carers

- Problems with PCNAs
 - Overlap with existing carers' assessment duties
 - Overlap with duty to conduct 'holistic' assessment of disabled children under CA 1989 s 17
 - Only general duty to provide services under section 17 – including to family members, s 17(3)
 - No link to CSDPA 1970 s 2 – the specific duty to provide services to disabled children...

Care Act - Introduction

- In force from 1 April 2015
- Abolishes most adult community care statutes
- CSDPA 1970 s 2 remains in force for children (up to 18)
- New scheme for adult care
- New duties around transition
- Suite of regulations, single guidance doc

Care Act - Adults

- Claimed to be ‘most significant reform of care and support in more than 60 years’
- BUT first achievement claimed for it by Ministers – cap on lifetime charging
- In fact, fundamentals of previous system (assess, decide, provide) remain untouched

Care Act – Adults (2)

- Summary of major changes
 - Well-being duty
 - Single national eligibility threshold
 - Safeguarding
 - Advocacy
 - Carers right to services
 - (Portability – sections 37-38)
 - (Application of HRA 1997 to private care providers – section 73)

Care Act – Adults (3)

- Well-being duty
 - Section 1 – a principled approach to care
 - Guidance 1.1; ‘The core purpose of adult care and support is to help people to achieve the outcomes that matter to them in their life’.
 - Duty requires LAs to ‘promote wellbeing when carrying out any of their care and support functions in respect of a person’ (guidance 1.2).
 - Series of other general duties in Part 1

Care Act – Adults (4)

- Eligibility threshold
 - At present, adult eligibility criteria set locally – ‘critical’, ‘substantial’, ‘moderate’ or ‘low’
 - Section 13 – requires national threshold to be determined in regulations
 - Regulations *aim* to set threshold at roughly ‘substantial’ level – so no more ‘critical only’
 - Always open to LAs to provide more than minimum eligibility threshold

Care Act – Adults (5)

- Safeguarding
 - Sections 42-47 – first statutory provisions on safeguarding
 - Section 42 – duty to make enquiries ‘to decide whether any action should be taken in the adult's case’ (but no duty to act)
 - Section 43 – Safeguarding Adults Board
 - Section 44 – safeguarding adults reviews
 - Death or ‘serious abuse or neglect’

Care Act – Adults (6)

- Advocacy
 - Sections 67-68
 - Section 67 – advocates must be involved in assessment and care planning where
 - Individual has substantial difficulty in one or more areas
 - No appropriate person to represent and support
 - Role of advocate – to ‘represent and support’
 - Section 68 – safeguarding enquiries and reviews

Care Act – Adults and Children

- Carers rights
 - Section 10 – duty to assess carers' needs
 - Section 20 – duty to meet carers' assessed needs which meet the eligibility criteria
 - First time we have had a clear statutory duty to provide services to carers with a focus on their needs

Care Act – Transition

- Sections 58-66 – transition to adult care and support
 - Assessments of children – ss58-59
 - Assessments of children’s carers – ss60-61
 - Power to provide services to carers – s62
 - Assessments of young carers – ss63-64
 - Continuity of services – s66

Care Act – Transition (2)

- Assessments of children – ss58-59
 - Requirement for ‘child’s needs assessment’
 - Where LA satisfied child likely to have needs for care and support post 18 (no set age)
 - Must assess if ‘satisfied that it would be of significant benefit to the child to do so and if the consent condition is met’ (no consent required if abuse or neglect)
 - Detailed requirements in section 59

Care Act – Transition (3)

- Assessments of child's carers – ss60-61
 - Requirement for 'child's carer's assessment'
 - Where LA satisfied carer of child likely to have needs for care and support post 18 (no set age)
 - Must assess if 'satisfied that it would be of significant benefit to the carer to do so and the carer consents
 - Detailed requirements in section 61
 - Must consider whether carer willing and able to continue providing care

Care Act – Transition (4)

- Power to provide services to child's carers – s62
 - LA can meet any needs it considers appropriate where satisfied carer has needs for support
 - Regulations can specify when this power should be exercised
 - Care and Support (Children's Carers) Regulations 2014
 - LA must have regard to any services being provided to carer under section 17 CA 1989

Care Act – Transition (5)

- Assessments of young carers – ss63-64
 - Requirement for ‘young carer’s assessment’
 - Where young carer likely to have needs for support after they turn 18
 - Must assess if satisfied that it would be of significant benefit to the young carer to do so and the young carer consents (unless risk of abuse or neglect)
 - Detailed requirements in section 64

Care Act – Transition (6)

- Continuity of services – s66
 - New section 17ZH inserted into Children Act 1989
 - Must continue to provide services post-18 until Care Act assessment(s) completed
 - New section 17ZI
 - Must continue to provide services where EHC Plan no longer maintained until Care Act assessment completed
 - New section 2A inserted into CSDPA 1970
 - Same as section 17ZH above (services must continue)

Justice for LB and 'LB Bill'

- The campaign to get justice for Connor Sparrowhawk and all the dudes
- A bill to make it harder for the state to force disabled people into residential care
- First draft published for debate – full and Easy Read versions
- All info at www.lbbill.wordpress.com
 - Including ways to have your say and get involved

Justice for LB and 'LB Bill'

- Key ideas in 'LB Bill'
 - Duty to have regard to need for full inclusion
 - Prohibition in taking into account cost of residential care in determining care at home
 - Requirement for sufficient supply of community support
 - Duty to secure most appropriate living arrangement
 - Requirement for approval for residential care
 - Amendments to MCA / MHA

Blog posts for more info

- Improvements under new system

<http://rightsinreality.wordpress.com/2014/08/19/five-reasons-why-new-sen-system-improves-on-present/>

- SEN Direct payments

<http://rightsinreality.wordpress.com/2014/08/28/why-sen-direct-payments-are-a-legal-damp-squib/>

- Local Offer

<http://rightsinreality.wordpress.com/2014/09/01/the-strange-case-of-the-missing-local-offers/>

- Local transition plans

<http://rightsinreality.wordpress.com/2014/09/01/local-transition-plans-another-sen-duty-being-ignored/>

Blog posts for more info

- Social care – CSDPA

<http://rightsinreality.wordpress.com/2014/08/25/csdpa-the-mystery-duty-for-disabled-childrens-social-care/>

- Judicial Review

<http://rightsinreality.wordpress.com/2014/08/30/why-judicial-review-is-a-real-remedy-in-sen-and-disability-cases/>

- Mental Capacity (decision making)

<http://rightsinreality.wordpress.com/2014/09/13/why-parents-can-make-decisions-for-young-people-under-the-send-reforms/>

- School Transport

<http://rightsinreality.wordpress.com/2014/09/19/school-transport-no-right-to-education-if-you-cant-get-there/>

Blog posts for more info

- Childcare

<http://rightsinreality.wordpress.com/2014/09/30/childcare-for-disabled-children-reasonable-adjustments-and-the-right-to-ordinary-lives/>

- Direct payments

<http://rightsinreality.wordpress.com/2014/10/11/direct-payments-dont-get-fooled-by-personalisation/>

- Care Act eligibility

<http://rightsinreality.wordpress.com/2014/10/27/care-act-2014-first-thoughts-on-eligibility-a-moderate-success/>

- Duty to consult (*Moseley v Haringey*)

<http://rightsinreality.wordpress.com/2014/10/29/duty-to-consult-supreme-court-sets-down-what-fairness-requires/>

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#JusticeforLB

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