

What social workers need to know about disabled children and the law

Community Care Live
September 2018

Steve Broach
Barrister
Monckton Chambers

This presentation is intended for general information and should not be relied upon in relation to any individual case.

Children's Welfare

Section 11 of the Children Act 2004 (social care and other local authority functions)

Section 175 of the Education Act 2002 (local authority education functions and schools)

Duty to 'have regard to the need to safeguard and promote the welfare of children'

- Requires 'active promotion' of children's welfare
(Baroness Hale in *HC*, see also *R (J and L) v Hillingdon*)

PSED

Section 149 of the Equality Act 2010

Requires public bodies to have 'due regard' to a series of specified needs when carrying out their functions.

Includes needs to eliminate discrimination and advance equality of opportunity

Bracking – two key issues:

1. Proper understanding of impact of the decision on disabled children and families
2. Specific regard to the needs specified in section 149

Health / Education / Social Care interface

- EHC Plans 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
 - BUT section 21(5) – ‘educates or trains’...

Tribunal's powers

SEND (FtT Recommendations Power) Regs 2017:

- Applies to local authority decisions and EHC plans issued or amended from 3 April 2018
- Specification of health or social care needs
- Specification of health or social care provision
- CCGs must respond to health recommendations within five weeks
- LAs must respond to social care recommendations within five weeks

Health / Social Care divide

- *R (T, D and B) v Haringey LBC*
- 3 year old child with tracheostomy – required significant levels of nursing care
- Court held this went beyond the scope of the local authority’s duties
- Local authorities are not allowed to act as a ‘substitute NHS for children’
- See more recently *R (Juttla) v Herts Valleys CCG* (‘Nascot Lawn’)

Social Care

- Children Act 1989 section 17 /
Working Together to Safeguard Children
 - All disabled children are children ‘in need’
 - Duty to carry out some form of assessment for all children in need (see CDC note re Warwickshire case)
 - Timescale – maximum of 45 working days
 - Immediate response in urgent cases
 - Requirement for child in need plan
 - Link to [Chronically Sick & Disabled Persons Act 1970 s 2](#)

Social Care

- Chronically Sick and Disabled Persons Act (CSDPA) 1970 s 2
 - 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 (see *ex parte Barry* and *R (KM) v Cambs*)
 - BUT once accepted to be necessary to provide service, LA must provide sufficient service or funding to meet need

Social Care

- The CSDPA service list
 - Practical assistance in the home
 - Recreational facilities, or assistance in obtaining
 - Assistance in taking advantage of available educational facilities
 - Transport to any social care services
 - Adaptations to home or additional home facilities
 - Holidays
 - Meals
 - Telephone, inc special equipment to use one

Short Breaks

- Breaks for Carers of Disabled Children Regs
 - Reg 3 – must have regard to needs of 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—
 - undertake education, training or any regular leisure activity,
 - meet the needs of other children in the family more effectively, or
 - carry out day to day tasks which they must perform in order to run their household.

Short Breaks

- Breaks for Carers of Disabled Children Regs
 - Reg 4 – 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
 - Includes daytime and overnight care, leisure activities and weekend and holiday services
 - Reg 5 – ‘short breaks services statement’
 - range of services, any eligibility criteria and ‘how the range of services is designed to meet the needs of carers in their area’.

Duties to parent carers

- Section 97 – parent carers’ needs assessments
 - 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))
 - cf new ‘Young Carers Assessments’

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’

Housing

- Duties on housing and children's services to co-operate to promote children's well-being
 - *R (J and L) v Hillingdon* – failure of co-operation
- Housing issues should be addressed in all child in need assessments (CA 1989 s 17)
- Families with disabled children may have 'priority need' so they can bid for social housing
- Families with disabled children can make 'homelessness' applications (Part VII HA 1996)
- Adaptations – Disabled Facilities Grants

Care Act

- Summary of major changes
 - Well-being duty
 - Single national eligibility threshold
 - Safeguarding
 - Advocacy
 - Carers right to services
 - Portability
 - Application of HRA 1998 to non-state care providers – section 73

Care Act – Well-being duty

- Section 1 – principled approach to adult social care – promotion of well-being
- General duty – to promote individual’s well being – starts with ‘personal dignity’
- Starting point is individual is best placed to judge own well-being
- Guidance suggests comes close to incorporating Article 19 CRPD

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)

- 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)

Care Act – Assessment

- Sections 9-13 (section 9 – adults; section 10 – carers)
- Very low threshold for duty to assess
 - Appearance of need for (care and) support
- Focus on well-being and outcomes
- Carer's assessment includes whether willing to provide care (section 10(5)(b))
- See further Assessment Regulations

Care Act – Eligibility

- Eligibility regulations – disabled people
 - Needs arise from or related to physical or mental impairment or illness
 - As a result adult unable to achieve two or more outcomes
 - As a consequence – significant impact on well-being
 - Unable – means in essence ‘finds difficult’...
 - Significant – more than minor or trivial?

Care Act – Eligibility

- Eligibility regulations – carers
 - Needs arise as a consequence of providing necessary care (see guidance)
 - Effect of carers needs is:
 - Deterioration in carer’s physical or mental health (actual or risk); or
 - Unable to achieve one or more specified outcomes
 - Consequence – significant impact on carer’s well-being

Care Act – Care Planning

- Section 8 – ways in which needs can be met
- Section 18 – duty to meet needs (adult)
- Section 20 – duty to meet needs (carers)
- Section 24 – next steps duties:
 - prepare a care and support plan or support plan
 - tell the adult which (if any) needs may be met by direct payments, and
 - help the adult with deciding how to have the needs met.

Care Act – Personal Budgets

- Section 26 – Personal Budgets
 - Statement which specifies
 - Cost to LA of meeting needs which it is required or decides to meet
 - Amount the adult must pay towards that cost
 - If there is a sum the LA must pay, that amount
 - May also specify other sums of public money available, for example
 - Housing
 - Health care
 - Welfare

Care Act – Direct Payments

- Sections 31-33 – Direct Payments
 - Adults with capacity – section 31
 - Duty if four conditions met
 - Adults without capacity – section 32
 - Duty if five conditions met
 - Regulations – section 33
 - Direct Payment Regulations
 - Conditions on use of DPs – Regulations 3-4
 - Process requirements – Regulation 5
 - Reviews – Regulation 7
 - Harmonisation with Health (not education) – Regulation 10

Care Act – Charging

- Sections 14-17 – charging and assessing finances
 - Section 14 – power to charge for meeting needs under sections 18-20
 - Limited by reference to minimum income requirement
 - *Section 15 – cap on care costs*
 - *LAs may not charge if total costs accrued exceeds cap*
 - *Section 16 – cap to be adjusted annually*
 - Section 17 – assessment of financial resources
 - See further Charging Regulations

Care Act - Safeguarding

- Safeguarding
 - Sections 42-47 – first statutory provisions
 - Section 42 – duty to make enquiries ‘to decide whether any action should be taken in the adult's case’ (but no duty to act) where reasonable cause to suspect:
 - Needs for care and support
 - Experiencing or at risk of abuse or neglect
 - As a result unable to protect himself
 - See Guidance at 6.56 / 14.91 re LA response

Health

Co-ordination Duties:

- NHS Act 2006 s 82 – NHS bodies and LAs must co-operate to secure and advance the health and welfare of the people of England and Wales
- Children Act 2004 s 10 – LAs and health bodies must co-operate to safeguard and promote the welfare of children in their area
- CFA 2014 s 26 – requirement for ‘joint commissioning arrangements’ between LAs and CCGs (and NHSE)
 - See also s 25 (promoting integration) and ss28-31

Health

National Framework for Children's Continuing Healthcare

- Non-statutory guidance
- Applies to 'complex' cases – inc behaviour
- National Framework reissued Feb '16 accompanied by
 - Pre-assessment checklist
 - Decision support tool
 - Guide for young people and parents (2 sides!)
- Guidance on who is eligible – Decision Support Tool
- Decision on eligibility in 6-8 weeks, then package of care (led by CCG?)

Health

National Framework for Continuing Healthcare and NHS-Funded Nursing Care

- Current version published November 2012
- Revised version March 2018, in force October 2018
- Applies to adults (over 18s)
- Statutory framework – see NHS CB and CCG (Responsibilities and Standing Rules) Regulations 2012
- Describes an ‘either / or’ split between NHS and local authority responsibilities
- Also based on the determination of eligibility through the application of a decision support tool
 - 2018 update has not altered eligibility criteria

Personal Budgets

- Relevant regulations:
 - Special Educational Needs (Personal Budgets) Regulations 2014
 - Community Care, Services for Carers and Children's Services (Direct Payments) Regulations 2009 (replaced for adults by those made under the Care Act 2014)
 - National Health Service (Direct Payments) Regulations 2013
 - National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) (No. 3) Regulations 2014

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 – direct payment should be made 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

- Level of personal budget / direct payment must be set at the reasonable cost of securing the necessary services
 - 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’.
- Resource Allocation Schemes can only give ‘indicative’ amount
 - See *R (KM) v Cambridgeshire CC*
<http://www.bailii.org/uk/cases/UKSC/2012/23.html>

Conclusions

- Law that now reflects good professional practice
- Some elements come with significant resource implications – EHC Plans, rights to services for carers, advocacy
- Other areas require new ways of thinking – well-being principle
- Real opportunity despite context of cuts

Steve Broach

Monckton Chambers

email

sbroach@monckton.com

twitter

@stevebroach

blog

rightsinreality.wordpress.com

The logo for Monckton Chambers is displayed within a dark red rectangular background. It features a large, white, stylized letter 'M' on the left. To the right of the 'M', the word 'MONCKTON' is written in a white, uppercase, sans-serif font. A thin white horizontal line is positioned below 'MONCKTON'. Underneath this line, the word 'CHAMBERS' is written in a smaller, white, uppercase, sans-serif font, with wide letter spacing.

M MONCKTON
CHAMBERS