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Disabled children: social care, equipment, home adaptations

A Briefing Paper by Michael Mandelstam for inclusion.Me

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Summary

Matthew Box at inclusion.ME asked me to write a briefing paper on legal aspects of equipment and home adaptations provision for disabled children – with occupational therapists in mind. The focus is on England. However, although legislation differs across the United Kingdom, many points covered will, at least broadly, be relevant to Wales, Scotland, Northern Ireland. The paper is divided into three parts.

First, the legal framework is set out, in order to identify which legislation is relevant for what sort of provision. In terms of any one piece of legislation it is important for occupational therapists to know how best its content can be utilised to meet disabled children's needs. And it is sometimes equally important to be aware of more than one piece of legislation; since what might not be achievable under one, may be under another. In other words, there may be more than one way to get things done.

The second part outlines the principles which the courts and the ombudsmen bring to bear when analysing the decision-making process of local authorities (and the NHS). It is essential to understand these, if local authorities and occupational therapists are to be able both to help children and families, as well as to defend the difficult decisions they must sometimes take.

For instance, when local authorities and occupational therapists reach decisions, those decisions must be consistent with legislation, not breach human rights, take account of relevant factors, disregard irrelevant factors, pay attention to central government guidance – and must be carried out within a reasonable period of time (unless there is a statutory time scale involved).

Notably, in addition, local authorities must not fetter their discretion – that is, apply blanket policies about what they will or will not provide by way of equipment, adaptations or, indeed, anything else.

The third section applies the first two sections in order to consider particular types and issues in provision – for example, car seats, shared care, additional space in the household, safety, behaviour, charitable help etc.

Terminology. Within this paper, CSDPA is the abbreviation for the Chronically Sick and Disabled Persons Act 1970; and HGCRA for the Housing Grants, Construction and Regeneration Act 1996 (covering disabled facilities grants).

Note. This briefing paper attempts to give legal pointers, it does not intended to be, and does not constitute, legal advice.

1. Legislation

There is a number of key pieces of legislation, relevant to the provision of equipment and adaptations for disabled children. This section outlines a number of these.

CHILDREN ACT 1989
The Children Act 1989 includes various duties which could embrace the provision of equipment or adaptations.

Section 17, Children Act: welfare of children in need including disabled children. Section 17 of this Act is broad-brush. It imposes a general duty on a local authority to safeguard and promote the welfare of children in need in its area. With equipment and adaptations in mind, its strengths are several:

- **Groups of children covered**: children in need are defined to include disabled children but also other children whose health or development is likely to be impaired, or for whom achieving and maintaining a reasonable standard of health or development is at risk;

- **Disability defined including mental disorder**: "a child is disabled if he [or she] 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" Development means physical, intellectual, emotional, social or behavioural development. Health means physical or mental health.

- **Help for family members**: section 17 provides for help for family members, not just the child;

- **Equipment and adaptations**: many years ago, the Court of Appeal commented that section 17 is expressed in broad enough terms to cover help with major home adaptations; clearly it could therefore cover equipment as well;

- **Residence condition**: the child just needs to be in the local authority's area, not necessarily "ordinarily resident" in the legal sense, and a child can legally be in two areas at once (e.g. shared care), so that both local authorities could incur the general duty under section 17[1] – which could of course include equipment;

[1] *R(Stewart) v London Borough of Wandsworth* [2001] EWHC Admin 709, para 28.

A major weakness of section 17 is that although there is an implied duty to assess[2], there is in general no easily legally enforceable duty actually to provide anything for a particular, individual child – equipment or anything else.[3] This does not mean that breach of section 17 cannot occur, but it may be more difficult to argue than a breach of section 2 of the Chronically Sick and Disabled Persons Act 1970 (CSDPA: see below).

On the other hand, the potential breadth of section 17 is considerable. The courts have accepted that section 17 is suitably wide enough to cover, for example, major adaptations.[4] And, clearly, if section 17 could cover adaptations, it can cover equipment.

In addition, provision can be made not just for a child, but any member of the family. And section 17 covers more than disabled children; it includes children whose health or development is being impaired or is at risk, but who are not necessarily disabled.

Schedule 2, Children Act. As part of the general duty under section 17, schedule 2 places a duty on a local authority 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.

Like section 17, the schedule 2 duty is a general one, but nevertheless must be properly considered. When a local authority failed singularly to meet the needs of a disabled girl in a shared care arrangement, schedule 2 and section 17 of the 1989 Act were both breached.[5]

And it is under schedule 2, in particular, that short break regulations have been made, placing a duty on local authorities to have a short breaks scheme for the carers of disabled children.[6]

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[2] *R(AA) v London Borough of Southwark* [2020] EWHC 2487 (Admin), para 18.
[3] *R(G) v Barnet London Borough Council* [2003] UKHL 57, House of Lords.
[4] *R(Spink) v London Borough of Wandsworth* 2005] EWCA Civ 302, para 45. And: (R(BG) v Medway Council [2005] EWHC 1932 (Admin). And: *R(L) v Leeds City Council* [2010] EWHC 3324 (Admin), para 28.
[5] *CD v Isle of Anglesey* [2004] EWHC 1635 (Admin), High Court, para 59.
[6] Department for Children, Schools and Families. Short Breaks: statutory guidance on how to safeguard and

Section 20, Children Act: welfare of a looked after child. Section 20 creates a more specific, stronger (than s.17) duty to safeguard and promote the welfare of any looked after child. So, this applies to each looked after child in particular, not just looked after children in general. If safeguarding and promoting the welfare of a child in need in section 17 can cover equipment and adaptations, clearly therefore section 20 could do so as well.

Section 22, Children Act: suitability of accommodation for a looked after child: adaptations? There is a specific duty to ensure that, when placing a looked after child who is disabled, the accommodation provided is suitable to the child's particular needs.[7]

Breach of this duty, in a previous (slightly weaker) form, was found by the courts when a local authority failed to ensure suitably adapted accommodation, in a second dwelling, for a disabled girl in the circumstances of a shared care arrangement. The teenager's mother's house had already been very extensively adapted; the question of adaptations in the foster carer's home, where the girl spent half the week, had now arisen.[8]

Fostering regulations: duty to provide equipment, aids. A fostering service provider must provide foster parents with such training, advice, information and support as appears necessary in the interests of children placed with the foster carer. In addition, the provider must ensure that the child is provided with such individual support, aids and equipment which the child may require as a result of any particular health needs or disability. [9]

CHRONICALLY SICK AND DISABLED PERSONS ACT 1970 (CSDPA)

Section 2 of the CSDPA contains a stronger duty than in section 17 of the Children Act. It creates a duty owed to each disabled child, not just children in need (including disabled children) in general. It has a very specific list of services/arrangements which local authorities must consider. It refers to

promote the welfare of disabled children using short breaks. London: DCSF, 2010.

[7] Children Act 1989, s.22C(8).

[8] *CD v Isle of Anglesey* [2004] EWHC 1635 (Admin), High Court, para 59.

[9] Fostering Services (England) Regulations 2011/581, rr.15, 17. Equivalent elsewhere in the UK: Local Authority Fostering Services (Wales) Regulations 2018/1339; Looked After Children (Scotland) Regulations 2009/210; Foster Placement (Children) Regulations (Northern Ireland) 1996/467.

adaptations by name; and to equipment arguably by way of the term "additional facilities"; in addition, equipment might be relevant to the provision of the other listed services.

Equally, section 2 of the CSDPA is in some respects more limited than section 17. For instance, it refers to provision for the disabled child only, not for family members. It has a tighter residency condition: the child must be "ordinarily resident" in the local authority area, not just "in the area" (as required by s.17 of the 1989 Act). Furthermore, whilst the specific list of services is helpful in one way, it is also exhaustive. For instance, respite or short breaks for a child's carers, by way of the child spending time elsewhere (other than the home), could not come under section 2.[10]

CSDPA: making a decision about equipment and adaptations. Section 2 states that if a local authority has functions under Part 3 of the Children Act 1989 in relation to a disabled child - and the child is ordinarily resident in its area - they must make any of the listed arrangements, which they are satisfied it is necessary for them to make, in order to meet the needs of the child.

This means that to argue that a child should be assisted with equipment or adaptations under the CSDPA, the OT would need to argue not just that the child is disabled and is ordinarily resident in the area – but that she or he (on behalf of the local authority) is satisfied that it is necessary for the local authority to make arrangements in order to meet the needs of the child.

CSDPA: eligibility criteria and occupational therapists. Under the Care Act in England, a decision about whether there is a duty to meet the needs of adults hinges on whether a person meets the Care Act eligibility criteria. However, there are no such national eligibility criteria for children, in either law or guidance, applying to the CSDPA.[11] So, it is for local authorities to decide locally how this decision about what is "necessary" is made. In doing so, the courts have stated that the local authority must distinguish any local criteria being used under section 17 of the Children Act, from any local criteria being used in relation to section 2 of the CSDPA.[12] This is because of the different nature of the section 17 and the section 2 duties.

[10] *R(JL) v London Borough of Islington* [2009] EWHC 458 (Admin), para 75.
[11] *R(JL) v London Borough of Islington* [2009] EWHC 458 (Admin), para 59.
[12] *R(JL) v London Borough of Islington* [2009] EWHC 458 (Admin), para 111.

A failure to distinguish between the two Acts, and the any local criteria being used, could therefore result in the unlawful diminution of the rights of a disabled child.[13] In practice, it appears that a distinction is often not made between criteria used under the Children Act from criteria used under the CSDPA – and, further, that staff may not even know which Act they are taking a decision under. This is not to be recommended.

CSDPA: arrangements, equipment, adaptations. The list of arrangements, about which a decision must be made, is as follows (underlining added).

- (a) the provision of practical assistance for the child in the child's home;
- (b) the provision of wireless, television, library or similar recreational facilities for the child, or assistance to the child in obtaining them;
- (c) the provision for the child of lectures, games, outings or other recreational facilities outside the home or assistance to the child in taking advantage of available educational facilities;
- (d) the provision for the child of facilities for, or assistance in, travelling to and from home for the purpose of participating in any services provided under arrangements made by the authority under Part 3 of the Children Act 1989 or, with the approval of the authority, in any services, provided otherwise than under arrangements under that Part, which are similar to services which could be provided under such arrangements;
- (e) the provision of assistance for the child in arranging for the carrying out of any works of adaptation in the child's home or the provision of any additional facilities designed to secure greater safety, comfort or convenience for the child;
- (f) facilitating the taking of holidays by the child, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;
- (g) the provision of meals for the child whether at home or elsewhere;
- (h) the provision of a telephone for the child, or of special equipment necessary for the child to use one, or assistance to the child in obtaining any of those things.

So where do equipment and adaptations fall within the above list?

Clearly assistance with works of adaptation is included explicitly within paragraph (e). Assistance could include helping people with obtaining an

[13] *R(B) v London Borough of Bexley* (2000) 3 C.C.L. Rep. 15. And: *R(JL) v London Borough of Islington* [2009] EWHC 458 (Admin),

adaptation from elsewhere, but equally could arguably include direct provision.[14]

Government guidance about adaptations, and its successor, stated that section 2 of the CSDPA could cover assistance with major adaptations.[15] The Court of Appeal doubted, without deciding, this but stated that s.17 of the Children Act could in principle extend to assistance with major adaptations. In any event s.2 of the CSDPA could cover minor adaptations, as could the term "additional facilities" in the same paragraph – a term which seems also to lend itself well to equipment.

Looking through the rest of the list of services, it seems clear that equipment could come under other paragraphs as well. For instance:

- Provision of "practical assistance" (paragraph a);
- provision of wireless or television (paragraph b), and maybe an update of the meaning of the word "wireless"(?);
- providing outings, recreational facilities etc. outside of the home, for which equipment might be required (paragraph c) – for example, a portable hoist?;
- assisting a child to take advantage of educational facilities (paragraph c) - a specialist car seat so a child can get safely to school? Or a communication aid at home, when a child has one at school, but cannot bring it home, and the school is not providing an additional aid at home?
- Assisting with travelling arrangements (paragraph d) – e.g. a specialist car seat, or other equipment associated with enabling travel?
- Assisting with holidays (paragraph f): similar to paragraphs (c) and (d) above – equipment that would enable a holiday to be taken;
- Help with telephone and the equipment to use it (paragraph h).

In other words, the scope for incurring a duty to assist with equipment, and sometimes with adaptations, under section 2 of the CSDPA is extensive. Furthermore, social services need legally to guard against not considering this list of arrangements, either by oversight or by policy. For instance, in the past, local authorities have lost legal cases through policies designed to restrict

[14] Local Government Ombudsman. *Salford City Council* (91/C/1972) 1993. And: LGO: *Wirral Metropolitan Borough Council* (89/C/1114) 1992.

[15] Department for Communities and Local Government. *Delivering Housing Adaptations for Disabled People: A Good Practice Guide*. London: DCLG, paras 2.7 - 2.8. This guidance was withdrawn, in favour of the following guidance, largely the same in content, which is not however published directly by central government: Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, paras 2.7 – 2.8.

assistance with holidays - policies applied irrespective of individual need and the wording of the CSDPA.[16]

Once a local authority has decided that it is necessary to meet a child's needs, then it must do so. It cannot arbitrarily back track, once a decision has been formally taken, simply because of concerns about resources, for example.[17]

However, the duty would be subject still to the principle of cost-effectiveness. That is, the local authority can argue that the duty goes only so far as to meet the essential, assessed need. It must also consider preferences under section 2 of the CSDPA itself.[18] A child's wishes must be considered under section 17 of the Children Act 1989. However, a local authority is not obliged to meet wishes or preferences; the language of the legislation is about need.[19]

CHILDREN AND FAMILIES ACT 2014 (CFA 2014)

The Children and Families Act 2014 (CFA) is a complex piece of legislation. In terms of equipment for disabled children, the following are some of the relevant points:

CFA: local offer, joint commissioning and equipment. The CFA imposes duties on local education authorities to publish a local offer and to commission services jointly in relation to education, health and care provision for children with special educational needs and for disabled children.[20] The Code of Practice goes on to make clear that both the local offer and joint commissioning should be detailed and specific. And, for example, cover equipment, for example, specialist equipment, wheelchairs and continence supplies.[21]

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[16] *R v North Yorkshire County Council, ex p Hargreaves (no.2)* [1997] 96 LGR 39 High Court, pp.3-4. And: *R v Ealing London Borough Council, ex p Leaman* [1984] TLR, 10 February 1984, High Court.

[17] *R v Wigan Metropolitan Borough Council, ex p Tammadge* [1998] 1 CCLR 581, High Court.

[18] *R v North Yorkshire County Council, ex p Hargreaves* [1994] 26 BMLR 121, High Court.

[19] *R(KM) v Cambridgeshire County Council* [2012] UKSC 23, para 34. And: *R v Gloucestershire County Council, ex p Barry* [1997] 2 All ER 1, House of Lords. And: *R(McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33.

[20] Children and Families Act 2014, ss.26 and 30.

[21] *Department of Education; Department of Health. Special educational needs and disability code of practice: 0 to 25 years: statutory guidance for organisations who work with and support children and young people with special educational needs and disabilities*. London: DoE, DH, 2014, paras 3.6, 4.40.

Although these are both rather general duties, prone in practice to vagueness, nonetheless they should in principle mean that there is greater certainty about what equipment may be available locally, and also less scope for argument about which organisation is responsible for which type of equipment.

CFA: education, health and care plans – and equipment. Broadly, if a school is unable to meet the special educational needs of a child from its own resources, the local authority may be required to create an education, health and care (EHC) plan.

In terms of equipment, any equipment to meet an educational or training need would be in the educational part of the plan; to meet a health need (reasonably required by the learning difficulties/disabilities resulting in special educational needs) in the health part of the Plan; and to meet a social care need in the care part of the plan.

(The care part of the plan must refer to anything at all being provided for a child under section 2 of the Chronically Sick and Disabled Persons Act 1970; or anything being provided under the Children Act reasonably required by the learning difficulties/disabilities of the child resulting in special educational needs).[22]

The Code of Practice makes abundantly clear that the provision set out in EHC plans must be specific. This includes specification in detail of what equipment is required by, and will be provided for, the individual child - including specialist equipment, wheelchairs and continence supplies.[23]

Once equipment is included in the educational provision part of an EHC plan, the local education authority has a duty to provide it.

Similarly, once equipment is included in the health provision part of the plan, the relevant NHS clinical commissioning group (CCG) has a duty to provide it. However, although it is the local authority that must pull the plan together, the

[22] Children and Families Act 2014, s.37.

[23] *Department of Education; Department of Health. Special educational needs and disability code of practice: 0 to 25 years: statutory guidance for organisations who work with and support children and young people with special educational needs and disabilities*. London: DoE, DH, 2014, p.156.

CCG must approve what goes into the health provision part of a plan.[24] And it is important to realise that, although set out in the EHC plan under the 2014 Act, any health provision would be made under the NHS Act 2006, which in general gives CCGs considerable leeway in deciding what they will or will not provide.[25]

As far as the care part of the EHC plan is concerned, the rules do not really add to what the child would anyway be assessed as needing under the Children Act and the CSDPA, already outlined above. This is because the 2014 Act states that, whatever (including therefore equipment) the child is being provided with under the CSDPA, it must be recorded in the care provision part of the plan. And likewise, any provision being made under the Children Act 1989, s.17, insofar as the provision is relevant to the child's learning difficulties.

Nonetheless, if a child has an EHC plan, and the local authority has not yet assessed the needs of the child under the CSDPA and Children Act, the ombudsman may find fault if it does not do so.[26]

These EHC Plans, giving an overview of a child's needs – together with clear local offers and joint commissioning – ought to clarify the question of equipment provision. However, this will not always be so, for instance:

Is a wheelchair educational or health care related? This tribunal case revolved in part around whether a wheelchair merely gave the student access to education at a sixth form college, in which case it would come under health provision and be for the NHS to provide. On the other hand, were the wheelchair to also, in its own right, have the effect of educating or training the student, then it would fall within the education part of the plan – and therefore be for the local authority to provide instead.

One of the reasons for the parents bringing the case was that they did not seem to trust the NHS wheelchair service to continue to provide what their son required; hence, it seems, they wished to argue that the wheelchair constituted educational provision, which would trigger an arguably stronger duty on the local authority to provide the wheelchair to and to maintain it.[27]

This aspect of the case revolved around section 22 of the 2014 Act, which states that any health care (or social care provision), which educates or trains

[24] Special Educational Needs and Disability Regulations 2014, r.12.
[25] *R v Brent and Harrow Health Authority, ex p London Borough of Harrow* [1997] E.L.R. 187. (An older special educational needs case involving therapy services, which the NHS refused to provide under NHS legislation).
[26] Local Government and Social Care Ombudsman, *Staffordshire County Council* (18 011 727) 2020.
[27] *East Sussex County Council v JC* (SEN) [2018] UKUT 81 (AAC).

the child, is to be regarded as educational provision, and as falling within the educational part of the Plan, and therefore would be for the local education authority, rather than the NHS (or local social services authority), to provide.

HOME ADAPTATIONS

The first legal port of call for major adaptations for a child is the Housing Grants, Construction and Regeneration Act 1996, under which disabled facilities grants (DFGs) are available. For the child to be eligible for such a grant, certain conditions must be met. These are set out below.

If a DFG is not available, or does not wholly meet the need, then housing authorities have a discretion under the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002 (RRO). For instance, they could help with an adaptation not covered by the DFG rules; alternatively, they could add additional funding to the maximum amount of DFG available of £30,000 (£36,000 in Wales).

If the child's needs are not met through a combination of both the 1996 Act and the 2002 Order, then a local social services authority would have a duty to consider whether to assist under social care legislation, in terms of the Children Act 1989, and the CSDPA 1970, both of which have already been outlined above.[28]

The steps to take would be to decide whether under the social care legislation, there were needs which the local authority accepted it was required to meet. It would then need to decide whether assistance, with the home adaptations in question, would be a cost-effective way of meeting the child's needs.

HGCRA: DFG eligibility. There are a few key questions, to be asked in order, which determine whether a child is eligible for a DFG. Is the child disabled? Do the works needed fall within the list set out in the HGCRA 1996? Are they necessary and appropriate (housing must consult social services about this)? Are they reasonable and practicable (in relation to the age and condition of the dwelling)?

[28] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, paras 2.7 – 2.8.

If the answer to all these questions is yes, then the local authority has a duty to approve the grant application. A decision must be made within six months of the application; and the grant forthcoming no more than 12 months from that date of application. If the grant is insufficient (it is capped at £30,000 in England), consideration may have to be given to topping it up, as outlined immediately above.

If the any of the answers are no, then the housing authority may still have to consider whether to use its discretion under the RRO; beyond that social services may have to consider whether it has a duty to assist, as also outlined immediately above.

The works set out in the HGCRA are as follows (underlining added):

- (i) to facilitate access by the disabled occupant to and from the dwelling, qualifying houseboat or caravan, or
- (ii) the building in which the dwelling or, as the case may be, flat is situated; (b) making (i) the dwelling, qualifying houseboat or caravan, or (ii) the building, safe for the disabled occupant and other persons residing with him;
- (c) facilitating access by the disabled occupant to a room used or usable as the principal family room;
- (d) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room used or usable for sleeping;
- (e) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a lavatory, or facilitating the use by the disabled occupant of such a facility;
- (f) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a bath or shower or both, or facilitating the use by the disabled occupant of such a facility
- (g) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a washhand basin, or facilitating the use by the disabled occupant of such a facility;
- (h) facilitating the preparation and cooking of food by the disabled occupant;

- (i) improving any heating system in the dwelling qualifying houseboat or to meet the needs of the disabled occupant or, if there is no existing heating system thereor any such system is unsuitable for use by the disabled occupant, providing a heating system suitable to meet his needs;

- (j) facilitating the use by the disabled occupant of a source of power, light or heat by altering the position of one or more means of access to or control of that source or by providing additional means of control;

- (k) facilitating access and movement by the disabled occupant around the dwelling, qualifying houseboat or caravan in order to enable him to care for a person who is normally resident there and is in need of such care;

- (l) such other purposes as may be specified by order of the Secretary of State: making access to a garden safe for a disabled occupant, and also facilitating access to and from a garden by a disabled occupant (SI 2008/1189).

HGCRA: DFGs and taking account of views and needs of others in the disabled child's household. As can be seen, the Act does not refer to the meeting of needs of other people in the home, except in relation to safety. However, guidance refers to the importance of local authorities' taking account of the views of parents and children, and of the needs of other children in the household and the needs of parents as carers:

- (**views of young people and parent carers**) "*It has long been recognised as crucial to involve disabled people in the assessment of their own needs. This is appropriate and consistent with the policy developments across the social care and health agenda to argue for the primacy of a disabled persons' perspective above all others. This is because the disabled person is the expert on their needs and should be listened to carefully by the relevant professionals. The views of parents and carers are also important, especially if they live in the same household.*

  Any assessment should take account of the views of disabled children and young people and their parents. Disabled children and their families will have clear and often practical views about any adaptations. Assessments of disabled children should take into account the developmental needs of the child, the needs of their parents as carers and the needs of other children in the family".[29]

NATIONAL HEALTH SERVICE ACT 2006

[29] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, paras 7.17 - 7.18.

In contrast to social care legislation, the NHS Act 2006 is surprisingly vague when it comes to children's (or adults') legal rights to health care. Even more surprising given its staggering size. For example, it contains nothing like the detailed and enforceable duty to be found in section 2 of the CSDPA, outlined above.

The courts have confirmed the difficulty of enforcing provision under the NHS Act 2006, if the issue is one of limited resources, competing priorities and the need to ration services. The principle applies to equipment as well; if life-saving treatment for a 10-year-old girl with leukaemia could not be enforced, how much more difficult to enforce provision of equipment it is likely to be.[30]

Thus, for instance, local wheelchair services operate to certain criteria; one example frequently found in such criteria, is that to qualify for a powered indoor/outdoor wheelchair, the person must need a powered wheelchair indoors as well.[31] This rules out a great deal of powered wheelchair provision by the NHS; arguably not on grounds of there being no clinical need, but simply in order to gatekeep. Yet, legally, it would be extremely difficult to challenge the application of such criteria when based on limited resources. In the following case, the health service ombudsman refused to intervene:

Lightweight manual wheelchairs: excluded on grounds of cost. An NHS primary care trust operated additional eligibility criteria for the provision of lightweight manual wheelchairs. A young woman with cerebral palsy was assessed by a charity as needing one, so that she could perform certain activities that she could not manage in her standard wheelchair. Her request was refused. The ombudsman found nothing wrong with the application of such additional criteria for lightweight wheelchairs, which were more expensive than the standard chairs.[32]

(Although in another case, it was shown that exceptions to this rule were never considered, and that therefore the NHS had "fettered its discretion", by applying a blanket policy with no possibility of departure from it in an individual case).[33] See Section 2 of this paper, below.

[30] R *v Cambridge Health Authority, ex p B* [1995] 6 MLR 250, Court of Appeal.
[31] For an example, taken at random, see: Sussex Community NHS Foundation Trust. *Eligibility Criteria Wheelchair and Specialist Seating Service*, 2016.
[32] Health Service Ombudsman. *Plymouth NHS Primary Care Trust,* 2002.
[33] Health Service Ombudsman, *Epsom and St Helier NHS Trust 2001* (E.559/99–00), 2001.

Continuing care for children. "Continuing care for children" is legally defined as that part of a package of a child's care which must be arranged and funded by the NHS (clinical commissioning group: CCG). This is not the same definition as for adults; for people aged 18 or over, "NHS continuing healthcare" is defined as a package of care to be funded and arranged *solely* by the NHS.[34]

The distinction in definitions for adults and children would seem to mean that, for children, joint packages of care between education, NHS and social services will be far more common than for adults. For children therefore, less so than for adults, this would suggest that more uncertainty could arise about which organisation is responsible for any equipment which a child needs.

Guidance states that: "*A 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*".[35]

The children's framework guidance for continuing care contains a decision support tool (DST). This is effectively an information-gathering and collection tool to pool assessments and information about a child under a number of "domains" of need. If a child scores sufficiently highly, such as gaining a "priority" or "severe" need in at least one domain, or three "high" needs in different domains, this is meant to indicate continuing care eligibility.

At the very least, it could be argued that if the equipment required by a child is in connection with the domains of need pointing to eligibility for NHS continuing care, then it is the NHS which would clearly have the responsibility for providing that equipment.

The guidance seems to characterise continuing eligibility for health care, as eligibility for input above what would normally be offered by the NHS. This is not particularly informative since what would "normally" be on offer can itself be a highly moveable feast. This is because of the leeway afforded by the NHS Act, and the consequent vagueness and variation from one area to another.

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[34] SI 2012/2996. NHS Commissioning Board and Clinical Commissioning Groups (CCGs) (Responsibilities and Standing Rules) Regulations 2012, r.20.

[35] Department of Health. *National Framework for Children and Young People's Continuing Care*. London: DH, 2016, p.5.

The legal distinction is that the NHS has more leeway to restrict and ration what has been offered as "normal", as opposed to leeway when it comes to "continuing care". This is because of the guidance which provides an additional legal limitation on such leeway. This then gives the courts more legal footholds with which to hold the NHS to account.

An illustration of this came in a 2020 case about the degree of care at home that a child on a ventilator required. The NHS clinical commissioning group had tried to reduce the child's care to the "normal", by removing the child's continuing care status – wrongly and unlawfully as it turned out, by undermining the evidence of a specialist respiratory practitioner. This it departed from both the guidance and its own local policy for ratifying continuing care decisions for children.[36]

HUMAN RIGHTS ACT

In deciding about a child's needs for equipment or adaptations, local authorities must take care not to risk breaching people's human rights.

However, the courts are mindful of the law, resources and policy matters which can restrict the provision of health and social care. And may be slow to find a local authority or NHS body in breach of its human rights obligations, if the heart of the matter is limited resources, policy and competing priorities. For example:

Failure to provide robotic arm: breach of human rights? The parents of a man with Duchenne's Muscular Dystrophy argued – supported by a rehabilitation specialist - that their son (through the relevant Dutch health insurance scheme), should be provided with a "MANUS" manipulator, a robotic arm, to be mounted on his electric wheelchair.

It would assist him, for example, in: pouring drinks and drinking; picking up various remote controls and using them; operating audio and video players, for example inserting and removing audio and video cassettes; switching a computer and printer on and off; pressing lift buttons and door bells when visiting third persons; shopping; making telephone calls and sending faxes; picking up items off the floor or out of cupboards; picking up papers and/or books and turning pages; scratching himself; and playing games.

It was argued that failure to ensure that this was provided amounted to a breach of article 8 (right to respect for private life) of the European Convention was breached. The European Court of Human Rights held that there was no breach, stating that: *"in view of their familiarity with the demands made on the health care system as well as with the funds*

[36] *R(JP) v NHS Croydon Clinical Commissioning Group* [2020] EWHC 1470 (Admin).

available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court".[37]

On the other hand, in the following case, the High Court declined to find a breach of article 3 of the European Convention (inhuman and degrading treatment) but did find a breach of article 8; because of the severe degree of omission and "corporate neglect" of its housing and social services duties. The breach interfered with the husband and wife's human rights, there were children involved – as well as equipment and adaptations issues:

Failure to provide equipment and adaptations or alternative accommodation: 'corporate neglect'. A local authority failed for some 20 months to meet the assessed community care needs of a woman, seriously disabled following a stroke.

Background. She had hemi-paralysis and almost no use of her right arm and leg. She had very limited mobility and was dependent on an electrically operated wheelchair, but the property was too small for this to be used. Likewise, too small for any substantial equipment or adaptations. She was doubly incontinent and had diabetes. She was cared for by her husband; he also looked after their six children, aged between 3 and 20.

Daily life. The husband's evidence was as follows. His wife was doubly incontinent and, with frequently less than one minute's warning of the need to use the toilet, commonly defecated or urinated before he could help her reach the toilet. He had to persistently clean the carpets, clothes and bedclothes. This happened several times each day. He had to go to the laundrette often twice a day, and buy incontinence pads, together with disposal pants and wipes. However, the family had had only State benefits to live on, so the cost of all this, and floor cleaner and carpet cleaner in addition, meant they were impoverished. This left them in rent arrears, unable to bridge the gap between housing benefit and the rent owing.

His wife could not access the upper part of the house at all and it was a real struggle for her to leave her bedroom, which was in fact, the family's living room accessed directly from the front door. With six children, there was no privacy. His wife found this situation depressing, demeaning and humiliating.

Local authority inaction. The local authority, for a number of reasons, including the rent arrears and a threat to evict the family, failed either to ameliorate the wife's situation through adaptations and equipment, or to move the family to more suitable accommodation. This failure stretched over a period of 20 months. A key cause of the inaction was the failure of the local authority's housing and social services departments to liaise effectively: it had been an "administrative void".

Article 3 human right: inhuman or degrading treatment: not breached, though finely balanced. Though the family had arguably been living in degrading conditions in the ordinary sense of the word, the court found that the "minimum level of the severity threshold" had not been crossed so as to breach Article 3. The living conditions had not been deliberately inflicted by the local authority; the suffering experienced was due to the

[37] *Sentges v Netherlands* (2003) Application 27677/02, European Court of Human Rights.

local authority's "corporate neglect" and not to a positive decision by the defendant that they should be subjected to such conditions. Therefore, though a "finely balanced" matter, Article 3 was not breached.

Article 8: right to respect for private and family life. The court found, however, that for Article 8, the matter was not delicately balanced; it had clearly been breached. (See below).[38]

On the other hand, if severe physical restrictions are actively put in place for a child, with an absence of up-to-date care plan, risk assessment, and consideration of less restriction, the courts will be far less hesitant to identify a breach of human rights. When a severely autistic child was confined for long periods at a special school in a padded room, known as the blue room - with an absence of all of these mitigating measures - the local authority was held to be in breach of both articles 5 (unlawful deprivation of liberty) and article 3.[39]

In contrast, when the parents of an eight-year-old locked their daughter in her bedroom every night, there was no breach of human rights or indeed any other legislation. The local authority had carried out a careful and thorough assessment, and all concerned agreed that – in all the circumstances - this was a carefully assessed, less restrictive and practicable way of keeping the child safe.[40]

EQUALITY ACT 2010

The Equality Act provides rights and protection for certain groups of people with a "protected characteristic" – in contexts such as provision of services, schools, housing. On the basis of their age alone, children are excluded from protection; however, a child would be protected on the basis of other characteristics, such as disability, for example.

The Act essentially protects from discrimination, as well as requiring reasonable steps to be taken and reasonable adjustments to be made to policies and practices. In addition, public bodies – such as local authorities and NHS – have what is generally referred to as a public sector equality duty (PSED). This means they must subject their policies to scrutiny to ensure that they do not have a discriminatory effect (intended or otherwise).

[38] *R(Bernard) v London Borough of Enfield* [2002] EWHC 2282 Admin.
[39] *C v A Local Authority* [2011] EWHC 1539 (Admin).
[40] *Local Authority v A* [2010] EWHC 978 (Fam).

A simple example of a potentially discriminatory policy would be the exclusion of autistic children, with associated behaviour traits, from consideration for a disabled facilities grant; since the needs of such children comes under the DFG rules in just the same way as the needs of children with different disabilities. Thus, both the Equality Act and the Housing Grants, Construction and Regeneration Act (covering DFGs) could be potentially breached.

A third piece of legislation that could, by the same token, be breached would be the Autism Act 2009, designed to ensure that autistic children and adults are assessed properly under both NHS and social care legislation, and have their needs met according to the same rules and principles as other children or adults in need.[41]

[41] Department of Health. *Statutory guidance for Local Authorities and NHS organisations to support implementation of the Adult Autism Strategy*. London: DH, 2015.

2. Decision-making principles

There are two main ways in which the decision making of local authorities (or the NHS) may be challenged. One is a judicial review legal case in the High Court – or alternatively a complaint to the Local Government and Social Care Ombudsman or to the Health Service Ombudsman (or to both at the same time, if both a local authority and NHS body are involved).

Alternatively, a challenge to an education, health and care plan – particularly the educational part of it – could be made to a special educational needs Tribunal. (Such a tribunal can consider also the health and social care parts of an EHC plan and make recommendations about them – without being able to order or enforce this).

DECISION-MAKING PROCESS

The courts in judicial review cases, as well as the ombudsmen, are generally preoccupied with the decision-making process rather than with the final decisions or outcomes.[42]

They are primarily concerned with how a local authority reached a decision, not generally with what the final decision was – and whether the decision taken fell within a reasonable band of possible decisions that the local authority could have made. And they are generally not going to consider whether the court, ombudsman or tribunal would necessarily have reached the same final decision. Nor, do they want to confront, at least directly, professional judgement; that is, generally, not their business. This may all sound a bit dry but is fundamentally important.

The ombudsmen look for maladministration and failure in service or to provide a service causing injustice. For the sake of an overview and for simplicity, the following broad-brush examples are treated as common to both ombudsmen and courts, but the reader should of course be aware of the fundamental difference between the procedure and ramifications of a legal judicial review

[42] The Health Service Ombudsman in England, and the Public Services Ombudsmen in Wales, Scotland and Northern Ireland can query professional judgement/clinical decision-making. The Local Government and Social Care Ombudsman in England cannot.

case – as opposed to an ombudsman case, which is in essence the last, independent, stage of a complaints process, not a legal proceeding.

The courts and ombudsmen do not want to be "over-zealous" in their scrutiny of decisions made by hard pressed local authority staff, whether those be social workers or occupational therapists:

- **Judicial review: not about subjecting assessments to over-zealous analysis**. "Again, one must always bear in mind the context of an assessment of this kind. It is an assessment prepared by a social worker for his or her employers. It is not a final determination of a legal dispute by a lawyer which may be subjected to overzealous textual analysis. Courts must be wary, in my view, of expecting so much of hard-pressed social workers that we risk taking them away, unnecessarily, from their front-line duties".[43]

In the following case, the local authority supplied sufficient evidence of its decision-making process so as to ward off judicial interference:

Adaptations for children: local authority disagreeing with mother, contested decision. The mother of two children with cystic fibrosis argued strongly, under section 2 of the CSDPA, for conversion of an outhouse, so as to store the various equipment her children needed. The local authority led detailed evidence as to how it had considered the mother's view – but how it believed that the conversion was not necessary in order to meet the children's needs.

The judge would not interfere with the local authority's decision: "the decision is expressly that of the local authority which is to be made in the light of the needs of the child and in the child's best interests, and that they must be taken to be as the local authority sees them, provided such a view is not irrational and provided that its view is scrutinised with some care".[44]

On the other hand, if a local authority does not, at a basic level, explain how it has considered evidence and how it has reached a decision based on that evidence, the courts may step in. In the following case, a local authority social worker, responsible overall for a care package for a young woman living at home with her family, rejected occupational therapy recommendations without plausible explanation:

[43] *R (Ireneschild) v London Borough of Lambeth* [2007] EWCA Civ 234, para 57.
[44] *R(L) v Leeds City Council* [2010] EWHC 3324 (Admin), para 59.

Local authority/social worker rejection of occupational therapy recommendations was legally flawed. An independent occupational therapy report had concluded that a woman needed 2:1 care including for all personal care, toileting and dressing and getting up and down the stairs in her home. She was profoundly disabled with learning difficulties, physical disabilities and autism. The local authority stated that it had indeed taken account of these two assessments, but that it had consulted two of its own OTs and it was entitled to take a different view on this basis – and would provide support for two hours a day only.

This was not consistent with the evidence and needs identified in the independent OT's report. Furthermore, it turned out that one of the council OTs had not seen the woman for over a year and herself conceded that she therefore could not be sure of the accuracy or otherwise of the expert, independent report (which had been based on first-hand observation).[45]

TAKING DECISIONS IN ACCORDANCE WITH LEGISLATION

The courts or ombudsman will generally want to examine whether the decision is in accordance with relevant legislation (and sometimes associated guidance), such as the Chronically Sick and Disabled Persons Act 1970, or the Children Act 1989.

For example, in a recent case the ombudsman set out the legal framework, and the different options within it, in relation to transport to school for a disabled child. The ombudsman pointed out that the options were not limited to educational legislation but included also the CSDPA 1970 (and the Children Act 1989) – which, as noted above, talks about assisting a disabled child to take advantage of educational facilities. The local authority had seemingly failed to consider this option, by omitting to carry out an assessment under s.2 of the CSDPA and failing therefore to conclude whether he had a need for assistance under that Act.[46]

In a case involving *Islington*, the local authority was applying a uniform set of local eligibility criteria for disabled children under both the Children Act and CSDPA 1970. It was not distinguishing between the two pieces of legislation. This was not lawful, because the duty under the CSDPA 1970 is considerably stronger than, for example, the duty under section 17 of the Children Act. Any criteria used needed to be based on a distinction between the two pieces of legislation.[47]

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[45] *R (JG) v London Borough of Southwark* [2020] EWHC 1989 (Admin), para 73.
[46] Local Government and Social Care Ombudsman, *Staffordshire County Council* (18 011 727) 2020.
[47] *R(JL) v London Borough of Islington* [2009] EWHC 458 (Admin), para 111.

The *Islington* case was essentially in the same vein as the *Bexley* case, in which again, the local authority tried to downplay the entitlement of a disabled boy and his mother – to practical assistance in the home by way of respite - by ignoring the CSDPA 1970. It had referred in its legal argument only to the Children Act whilst ignoring the CSDPA. The judge held this to be impermissible; it was akin to pretending the child was not disabled.[48]

When a local authority had to consider shared care arrangements, it might have already adapted one home under one piece of legislation (probably with a disabled facilities grant) but had – as the judge pointed out – to be aware also of what is now, s.22 of the Children Act to ensure that accommodation for a disabled, looked after child, is suitable. As well being aware of section 17 and schedule 2 of the same Act. All in respect of considering adaptations in the second dwelling in which the child was living.[49]

Children may require short breaks away from home, which come under the Children Act, but also holidays under the CSDPA. (And, for occupational therapists, sometimes the issue may then arise of what equipment might be required). For example, a failure to consider whether to provide for a person's social, recreational and leisure needs undermined the direct reference to such matters in s.2 of the Chronically Sick and Disabled Persons Act 1970.[50]

Likewise, under the same Act, the failure to consider assistance with any holidays, unless they had been arranged by the local authority itself, was unlawful. This was because the 1970 Act explicitly refers to holidays arranged by the local authority – or 'otherwise arranged'.[51] In other words, a clear case of not reading the legislation.

TAKING ACCOUNT OF RELEVANT FACTORS

The courts and the ombudsman will also want to see that the factors taken into account were relevant – and that, at the same time, irrelevant factors were excluded – when a decision was made.

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[48] Although, for other reasons, the local authority won the case: *R(B) v London Borough of Bexley* (2000) 3 C.C.L. Rep. 15.

[49] *CD v Isle of Anglesey* [2004] EWHC 1635 (Admin), High Court.

[50] *R v London Borough of Haringey, ex p Norton* (1997-98) 1 C.C.L. Rep. 168.

[51] *R v Ealing London Borough Council, ex p Leaman* [1984] TLR, 10 February 1984, High Court.

For example, in a case involving the hoisting of a young, profoundly disabled woman at a day centre, the local authority came to a decision without, at least in the record of that decision, having taken account of her severe osteoporosis and the risk that hoisting could therefore pose. The decision could not stand and would need to be retaken.[52] The following case, involving a child on a ventilator at home, is a warning against the shortcuts which seem, in NHS continuing care, to be all too common.[53] The relevant factor ignored in this case was the decision was made on the basis of ignoring or distorting the evidence of the specialist practitioner concerned:

Child on ventilator; continuing care unlawfully removed and relevant evidence ignored. A clinical commissioning group (CCG) removed a child's continuing care status of a child living at home and on a ventilator at night - and accordingly reduced the care provided for him. a child on a ventilator.

However, a manager had misrepresented the assessment and information provided by a specialist respiratory nurse about the child's needs. The CCG had thus taken account of an irrelevant factor, whilst failing to take account of accurate and relevant information. The manager claimed the child's needs had reduced; the specialist had furnished evidence to the opposite effect. In addition, the CCG did not follow its own rules which required a panel to take final decision, rather than the particular manager; and the CCG's reasoning for the reduction in care was therefore inadequate. Legally, the decision was hopelessly flawed.[54]

NOT ACTING IRRATIONALLY

If a decision is made that is clearly outside of the band of decisions which a reasonable local authority could have made, the courts will sometimes strike down the decision on grounds of irrationality or unreasonableness – or, even, of a local authority having taken leave of its senses.

For instance, when a nurse completed a continuing care "Checklist" negatively with no comment, evidence or reasoning, and had post-dated it so as to cover up that it had been done legally at the wrong time, the judge found this irrational and unreasonable.[55]

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[52] *R(SC) v Salford City Council* [2007] EWHC 3276 Admin.
[53] Mandelstam, M. *NHS Continuing Healthcare: A-Z of Law and Practice*. London: Jessica Kingsley Publishers, 2020.
[54] *R(JP) v NHS Croydon Clinical Commissioning Group* [2020] EWHC 1470 (Admin).
[55] *R(Dennison) v Bradford Districts Clinical Commissioning Group* [2014] EWHC 2552 (Admin), paras 12, 13, 17.

In a case involving the CSDPA 1970 (and so relevant to children), night sitter services were withdrawn from an 86-year-old woman on the basis of her no longer needing them, but without evidence of a change of circumstance or need. The court stated that there was a very strong argument that the authority was acting irrationally or unreasonably.[56]

In the following case it was irrational to claim that a member of staff was a specialist in relation to autism, when, on the evidence, she clearly wasn't.

Irrationality of local authority's claim about the competence of a member of staff to teach an autistic child. A dispute arose over the competence of a supply teacher who had been taken on to teach an autistic child. The child's statement of special educational needs required that she be taught by a teacher experienced in teaching children with significant learning difficulties and autism and communication disorders.

The court expressed its reluctance to intervene except when a decision appeared legally irrational. However, in this case, the judge found that the local authority could not reasonably have characterised the teacher as 'experienced'. In fact, she had limited experience and specialist educational qualification. Thus, the authority was in breach of its duty to arrange the special educational provision specified in the statement of need.[57]

BLANKET POLICIES, FETTERING OF DISCRETION

The principle that local authorities must not fetter their discretion, by enforcing a blanket policy, could apply to equipment and adaptations. For instance, in one case, the NHS wheelchair service had applied too rigid an approach to indoor-outdoor powered wheelchairs:

Applying guidance too restrictively. A complaint was made by the parents of their disabled son, respecting provision for him of an electrically powered indoor/outdoor wheelchair. The health service ombudsman found that the NHS trust had applied local and national guidance too restrictively and had not taken account of his previous experience of using such wheelchairs. It had also failed to consider whether he had exceptional needs not coming under the terms of the guidance.[58]

In another, a local authority had fettered its discretion by applying a blanket policy not to use its discretion to exceed, by topping up, a disabled facilities grant beyond the maximum, mandatory maximum amount (now £30,000 in England). The ombudsman pointed out that not only was it a fettering of

[56] *R v Staffordshire County Council, ex p Farley* [1997] 7 CL 572, High Court.
[57] *R v Wandsworth London Borough Council, ex p M* [1998] ELR 424, High Court.
[58] Health Service Ombudsman, *Epsom and St Helier NHS Trust 2001* (E.559/99–00), 2001.

discretion which is fault in itself, but that the policy as applied in this case was in any event financially short sighted:

Unacceptable fettering of discretion, not to exceed the DFG maximum grant, was maladministration and not best use of council's resources. The consequence of a blanket policy of not exercising the discretion meant delay in funding the adaptations was a fettering of discretion. (At the time, the discretion to exceed the maximum was contained in 1996 regulations which have since been repealed in England).

Absurdly, the consequence of the rigid policy and delay in eventually agreeing the adaptations was to cost the local authority £735 per week. This was to pay for residential care until the adaptations were completed and the man could return home; he had muscular dystrophy, a benign brain tumour and used a wheelchair. Yet no consideration had been given as to whether it would have been better use of resources to get on with the adaptations instead. All this was maladministration.[59]

As mentioned above, the question of holidays for children may arise under the CSDPA 1970. In one case, the local authority acted unlawfully by having a blanket policy about what holiday costs, including equipment, it would provide for. It would cover only extra costs (related to the disability), and not the ordinary costs that anybody would incur in taking a holiday. The policy had unlawfully fettered the discretion of the local authority.[60]

In the following case, the ombudsman found that a disabled child had fallen foul of a local authority's blanket policy about rent arrears and transferring home:

Fettering of discretion affecting severely disabled child. A local authority had an inflexible policy preventing council tenants from transferring home, if in rent arrears. This policy resulted in a fettering of discretion and an 'appalling catalogue of neglect' by the local authority which was both welfare authority and landlord. This was because the policy was imposed on a family with a severely disabled son with exceptional needs (in addition, the rent arrears had been miscalculated); the local ombudsman recommended £20,000 compensation.[61]

[59] Local Government Ombudsman, *Walsall Metropolitan Borough Council* (07/B/07346), 2008.
[60] *R v North Yorkshire County Council, ex p Hargreaves (no.2)* [1997] 96 LGR 39 High Court
[61] Local Government Ombudsman. *Bristol City Council* (96/B/4035 and 96/B/4143) 1998.

3. Children's equipment and adaptations: specific examples and issues

The above two sections have set out the statutory framework and the principles used by courts and the ombudsmen. The following now applies both of these sections to particular issues and examples of provision of equipment and adaptations for disabled children.

CAR SEATS

The provision of car seats for disabled children has been a longstanding source of uncertainty, with seemingly variable practice across local authorities.[62] It would seem, from anecdotal report, that some local authorities may simply refuse to consider providing them at all; others may provide them against certain criteria; others still may have no policy at all and provide, or not provide, on an *ad hoc* basis. A few legal pointers, toward evolving a policy and associated practice, might be as follows:

Car seats and the legislation. First, could car seats in principle come under the relevant legislation? Section 17 of the Children Act is drawn in very wide terms, about safeguarding and promoting the welfare of a children in need, including disabled children. If it is capable of embracing help with major adaptations[63], it must, presumably, be capable of covering car seats in principle. It may be a weaker duty than that under the CSDPA, but even a weaker duty could be breached, were a local authority to adopt a blanket policy of non-provision – thereby fettering its discretion.

More specifically, under section 2 of the CSDPA, car seats could clearly be relevant. For instance, in relation to accessing educational facilities, outings, recreation, holidays – i.e., anything away from the home which is covered by section 2.

Car seats and relief from poverty: disability or non-disability related? What sort of policy might be consistent with this legislation? Local authorities argue sometimes that it cannot have been the intention that they simply cover the provision and expense of what any child of a certain age would need (i.e., a

[62] Newlife. *Equipment Crisis*. Cannock: Newlife, 2018.
[63] *R(Spink) v London Borough of Wandsworth* 2005] EWCA Civ 302, para 45.

children's car seat). That is to say they would maintain that section 2 of the CSDPA 1970 was not intended to function as straightforward relief from poverty, simply because there is a disabled child in the family. This seems, intuitively, to be a reasonable position to take.

However, it may not be so straightforward. In a previous CSDPA case, the *Hargreaves* case, the High Court appeared to disagree with such an approach – albeit in relation to another aspect of section 2 - in the form of help with holidays.

The local authority had argued that it was not there to relieve poverty under the CSDPA; it would over only "special equipment or special accommodation necessitated by the disabilities" in order for the holiday to take place. Other expenses – those anybody would incur on a holiday - would have to be covered by the person themselves. The judge disagreed with this approach, stating that the argument (underlining added):

- "*namely that the legislation was not intended to provide relief from poverty, but relief from the extra expense of disability, begs the question. <u>If the Council have determined, as in this case, that the need for the holiday is a result of the disability, then the cost of the holiday to the disabled person must be capable of being an additional cost which is the result of the disability</u>, although the question may well arise as to whether in the particular case it is necessary, in order to facilitate the holiday to assist with that cost*".[64]

The court pointed out that if the person had sufficient financial means the local authority could consider recovering the cost of the holiday. (For children under 16 years old, local authorities have a power to charge under s.29 of the Children Act 1989, including in principle CSDPA provision). In other words, the relevance of the parents' resources would bite at the point of considering whether to make a financial charge – not at the point of deciding whether there was a duty to meet the need in the first place.

Applying the principle of that case to car seats would suggest the following. If a car seat was necessary - in order to meet assessed, disability-related needs to get into the community under the CSDPA - then the local authority would have to consider providing it. Certainly, for example, if the car seat itself were

[64] *R v North Yorkshire County Council, ex p Hargreaves (no.2)* [1997] 96 LGR 39 High Court, p.3.

specialist and so very expensive compared to an ordinary child's car seat; or, for instance, if the car seat were needed for a child at an age when a car seat would not normally be required. However, if the *Hargreaves* case is considered, any policy probably should not exclude (by way of a blanket policy) assistance even in respect of an ordinary car seat for a disabled child - if it is required to meet an assessed need under section 2 of the CSDPA.

The question as to whether occupational therapists have the expert knowledge to assess and make decisions about car seats is a separate and subsidiary question. If necessary, expert input can be sought, including referrals to driving assessment centres – to feed into the decision which social services makes about whether a car seat is required to be provided under the CSDPA.

CHILDREN, BEHAVIOUR, SAFETY EQUIPMENT AND HOME ADAPTATIONS

Under both the CSDPA 1970 and the HGCRA 1996, a disability is defined to so as to include mental disorder.

Section 2 of the CSDPA refers to additional facilities and adaptations for greater safety, comfort or convenience. Section 23 of the HGCRA 1996 includes, within the list of eligible works, making a dwelling safe for the disabled occupant and other people living there. So, safety in principle comes explicitly under both Acts. Therefore, a range of equipment and adaptations could fall, under one Act or the other, to be provided for a child in order to promote safety.

It follows that in meeting need, including keeping a disabled child safe, both Acts apply as much to behaviour linked to a mental disorder, as they would to physical or sensory disability. Therefore, there may be a duty to provide a range of equipment and/or adaptations in order to keep a child safe on grounds of behaviour which is putting them at risk. As guidance about home adaptations, under the HGCRA 1996, makes abundantly clear:

- (**Guidance: safety and behaviour**)*: "Section 23(1)(b) allows grant to be given for certain adaptations to the dwelling or building to make it safe for the disabled person and other persons living with them. This may be the provision of lighting where safety is an issue or for adaptations designed to minimise the risk of danger where a disabled person has behavioural problems which causes them to act in a boisterous*

or violent manner damaging the house, themselves and perhaps other people. Where such need has been identified, DFG is available to carry out appropriate adaptations to eliminate or minimise that risk".[65]

The guidance refers to, as instances (therefore not exhaustive):

- "*toughened or shatterproof glass in certain parts of the dwelling to which the disabled person has normal access or the installation of guards around certain facilities such as fires or radiators to floors, walls or ceilings may be needed, as may be cladding of exposed surfaces and corners to prevent self-injury*".[66]

An example of the potential extent of these duties came in a DFG legal case, involving a loft conversion to create an extra bedroom for an autistic child:

Loft conversion for extra bedroom for autistic child on safety grounds. The parents of an autistic disabled boy had applied for a grant to convert the loft into an additional bedroom.

He currently shared a bedroom with a younger brother. He was violent and disruptive to his brother through the night. For instance, he would hit him, kick him, trip him, swing him and deliberately wake him up. He would get out of bed, yell in his ear, throw toys at him, pull the quilt off, hang down from the top bunk and grab him, rock his bed as hard as he could whilst in it (he had already broken one set of bunk beds which were bought in), frighten him by talking about ghosts/monsters without heads, and wake him up each morning at 5am etc.

On grounds of the safety of both brothers (the disabled occupant and his sibling), the Court of Appeal held that this was in principle a perfectly valid use of DFG.[67]

It is clearly important to be clear which legislation applies and why. For instance, in one case, a father applied for a DFG for his son, by way of converting a garage into a sensory room for his son. The local authority decided that this would not constitute eligible works under the HGCCRA.[68] This was presumably (the report of the case does not elaborate) because the meeting of sensory needs is not something that explicitly comes under DFG-eligible works. Whereas safety-related works would in principle be eligible works; so in such an example, it would be a question of whether the sensory room fulfilled a safety purpose – as opposed to a therapeutic purpose only.

[65] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, Annex C, para 19.
[66] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, Annex C, para 21.
[67] *R(B) v Calderdale Metropolitan Borough Council* [2003] EWHC Admin 1832, High Court; [2004] EWCA Civ 134, Court of Appeal.
[68] Local Government and Social Care Ombudsman. *South Kesteven District Council* (16 016 803), May 2018.

(Illustrating the principle that a DFG application must relate to what the HGCRA states was the following case. a 44-year-old-man with severe epilepsy lived in a bungalow with his parents. He wanted an extra room by way of a loft conversion so he would have an extra room for himself. But he already had access to a bedroom in the bungalow and to a principal family room (the lounge). Thus, there was no duty triggered under the HGCRA to consider provision of such a room – since he already had access and use of the types of room referred to in the HGCRA.[69] In other words, the HGCRA did not refer to additional or extra rooms, for whatever purpose).

In a legal case involving Leeds City Council, a mother wanted an outhouse converted to store equipment for her two children with cystic fibrosis. The argument was not made under the HGCRA (DFG legislation), because equipment storage is not contained within the list of eligible works in that legislation. The argument proceeded instead, therefore, under section 2 of the CSDPA (with the Children Act lying behind it) which does refer to adaptations and without a prescribed list of what types of adaptation might or might not be eligible.[70]

On the other hand, even if an application is made for something outside of the prescribed list of mandatory DFG works, housing authorities should still at least consider the application and whether to use discretion to fund the alternative works - under the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002. As the ombudsman held in a case when a newly quadriplegic young man had wanted adaptations so that his downstairs bedroom would be large enough for friends to visit him.[71]

Whether adaptations (and equipment) for behaviour are "necessary and appropriate". Even if the works are within the list of prescribed purposes, overall eligibility depends further on a decision as to whether they are "necessary and appropriate" to meet the needs of the disabled child. Social services (usually occupational therapists) are called on to make a recommendation to housing; it is the latter that takes the final decision.

[69] Local Government and Social Care Ombudsman. *Stoke City Council* (17 010 521), 2018.
[70] *R(L) v Leeds City Council* [2010] EWHC 3324 (Admin)
[71] Local Government Ombudsman. *Kirklees Metropolitan Borough Council* (07/C/05809), 2008.

For instance, it may be that in some cases relating to behaviour, professionals assess that the needs may be better met in another way – other than through the adaptations being applied for. For instance, in the *Calderdale* case, about a loft conversion to create an extra bedroom for an autistic child, input had been sought from paediatric occupational therapy services – whilst an intensive support team nurse and the child and family mental health team was also mentioned. Indeed, outside of the family environment – namely at school – he had made very good progress, behaviour wise.[72]

In other words, there may be other solutions, at least to explore – solutions which may be instead of, or in addition, to home adaptations, depending on the circumstances. Nonetheless, the HGCRA 1996 is focused primarily on present need.[73] And the *Calderdale* case illustrated that if a significant need (for the additional bedroom) in the home remained at least for the foreseeable future, then notwithstanding that there were wider issues concerning safety, and more than one way of assisting the child – nonetheless an adaptation might still be necessary and appropriate if it had the effect of minimising risk, although not necessarily removing it altogether.[74]

Indeed, more generally, the courts held in 2020 that a DFG need not be "all or nothing"; that the eligible works being applied for (in that case an external platform lift for access) do not have to address/meet all the needs of the person (the kitchen and bathroom were not ideal).[75]

Safe spaces. There is no reason in principle why provision could not encompass a "safe space" an enclosed environment, sometimes referred to as a "room within a room", to manage risk and difficult behaviour. However, insofar as this means restriction of the child, it would have to be shown that this was a less or least restrictive option, and that any such restriction would be kept to the minimum necessary.

For instance, in one major legal case, the management of an 8-year-old, with Smith Magenis Syndrome, was in issue. A safe space was considered; but the

[72] *R(B) v Calderdale Metropolitan Borough Council* [2003] EWHC Admin 1832, High Court; [2004] EWCA Civ 134, Court of Appeal.
[73] *R(McKeown) v London Borough of Islington* [2020] EWHC 779 (Admin).
[74] *R(B) v Calderdale Metropolitan Borough Council* [2003] EWHC Admin 1832, High Court; [2004] EWCA Civ 134, Court of Appeal.
[75] *R(McKeown) v London Borough of Islington* [2020] EWHC 779 (Admin).

judge agreed that whilst this was certainly a possibility given the circumstances, it appeared to constitute a more restrictive option than simply making her bedroom safe and locking the door at night. It was described as providing:

- "*an alternative to wall padding and is best described as a 'room within a room'. Safe spaces are made with industrial strength PVC walls, which are positioned away from the walls of a room, the PVC is pulled taut on a steel frame and flexes to absorb impact. The flexible walls and thick, soft padded floor reduce the risk of the person inside being able to harm themselves on walls, floors and other hard surfaces. A safe space has the advantages of protecting A from objects in her room, but she would still need to be confined in one space*".

About use of the safe space in this particular case, the judge concluded as follows:

- "*It was not possible for me to see the 'safe space bed' however; I do hold reservations about the use of it. A would be able to see out of it but I believe that she could feel more enclosed than if she were locked in the open space of her room, thereby feeling the true impact of her liberty being restricted. I also, concur with Dr Rippon that the 'safe space bed' would limit her access to the toys and slide in her room. The advantages of the 'safe space bed' such as protecting A from objects in her room … or walking off the windowsill are lost when considering A's likely reaction to being confined in a PVC constructed bed … It is my assessment that the mother's current practice of locking A in her room is in the best interests of the child and is a significant preventative measure in protecting her from harm.*

  As a result, I believe it should be allowed to continue. This would not prevent the mother and the local authority continuing to search for alternative ways to keep A safe, including by agreement, a trial period using the 'safe space bed'."

But it should be noted that the safe space in this case was not ruled out in principle, only in the particular circumstances.

BATHROOM ADAPTATIONS

The HGCRA 1996 (see above) explicitly states that a disabled occupant may need access a bath, a shower – or both, depending on need (i.e. what is necessary and appropriate). It also explicitly states that it is not just about access – but also "facilitating the use by the disabled occupant of such a facility".

Furthermore, the need of access may not just be a physical one; in one case the ombudsman found that the local authority needed to consider at least a mental health issue. It concerned a situation in which it was clear to everyone that the reason that the person did not use her bath, was not due to any physical limitations but to her fear of getting stuck in the bath. This resulted in anxiety attacks and possible black outs.[76]

Bathroom adaptations, like other works, remain subject to what is judged "necessary and appropriate". So, for instance, a family (and occupational therapist) might argue for a specialist (height adjustable) bath and hoist - rather than a significantly cheaper wet floor shower. The occupational therapist would have to evidence why the more expensive solution was necessary and appropriate to meet the child's needs – and for good measure explain why the shower was not capable of meeting those same needs.

Needs and views of other members of the family: bathrooms. Sometimes the question arises about the impact of a bathroom adaptation on the rest of the family. For instance, if a shower is to be recommended for the disabled occupant, the family may feel that other children should not have to forgo using a bath in their childhood. The family then argues for a shower in addition to the bath, not instead of it. A number of points may be made about an example of this type.

First, the HGCRA 1996 refers to meeting the needs of the disabled occupant. It does not explicitly refer to the needs and wishes of others in the dwelling (other than if the works are related to safety, when other people are explicitly mentioned).

Second, however, guidance makes clear that the local authority must take account of the views of the parents – and the needs of other children:

- 7.18 Any assessment should take account of the views of disabled children and young people and their parents. Disabled children and their families will have clear and often practical views about any adaptations. Assessments of disabled children

[76] Local Government and Social Care Ombudsman. *Royal Borough of Greenwich* (16 010 864), 2019, para 28.

> should take into account the developmental needs of the child, the needs of their parents as carers and the needs of other children in the family.[77]

The Guidance also states that when providing for the disabled occupant, the local authority should take account of the high levels of stress experienced by parents with disabled children and take account of the needs of any non-disabled children in the family.[78]

And, of course, as a matter of common sense, a local authority cannot simply ignore the basic, everyday needs of others living in the dwelling.

Third, therefore, if there are other people/children in the home, their needs should at least be considered in line with the guidance. For instance, in one ombudsman case the local authority failed to take account of the needs of a foster child in the home, when considering adaptations for a disabled adult occupant in the same dwelling.[79]

Similarly, when a local authority considered the installation of a shower cubicle for a disabled woman, if failed to consider the needs of one of her sons, who was himself disabled and had medical needs (including epilepsy). The occupational therapist dismissed the impact of the adaptation (involving a bedroom conversion, relating to the shower) on the son and said it was not relevant where he lived or how the rooms were occupied. Since Mrs X said her concerns were based on her son's medical needs, the ombudsman found that it was the local authority's responsibility to decide whether this was an acceptable risk.[80]

Fourth, however, in the absence of "needs" in the case of other non-disabled occupants/children, within the home, it is far from clear that the wishes of parents – in respect of other children – is a ground for the funding of more expensive adaptations. It may be that, up to a point, certain sacrifices have to be made.

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[77] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, para 7.18.
[78] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, para 7.28.
[79] Local Government Ombudsman. *Kirklees Metropolitan Borough Council* (07/C/05809), 2008.
[80] Local Government Ombudsman. *London Borough of Richmond upon Thames* (15 018 001), 2016, para 43.

The ombudsman noted in one case that, under the terms of the HGCRA 1996, the local authority is not required to consider the needs of other non-disabled residents in the dwelling.

Other members of the family and eating together. The case concerned a downstairs conversion, rather than the extension, which would meet a disabled child's needs for sleeping, bathing and access to the principal family room. It would have meant loss of a separate dining room; leaving a principal family room (as demanded by the HGCRA) and the kitchen to eat in. However, the size of the kitchen would mean that not all the whole family (including the other non-disabled children) could eat there together. The ombudsman stated that the local authority was not required by the HGCRA to consider the needs of other (non-disabled) residents when awarding a disabled facilities grant.[81]

A possible criticism of this case is that that the ombudsman did not mention the guidance. Which does in fact refer to the need for the family to have a dining space where they can all eat together.[82]

In the following case (not a children's case), the local authority argued for a more cost-effective way of providing access to the bathroom for a woman's mother. The daughter felt she was being asked to make a considerable sacrifice, since she would have to give up her own bedroom. The ombudsman declined to interfere with the decision:

Sacrifice made by one member of a family for another. In a mother/adult daughter case, the mother had moved in with the daughter. A bathroom adaptation was required to give the mother the ability to access it. The more cost-effective option was to create a "Jack and Jill" bathroom; but for the disabled mother to access it, it would mean mother and daughter swapping bedrooms. The daughter was unhappy with this saying she felt like her space was being encroached upon, and that she had already made sacrifices for Mrs Y to live with her. The ombudsman that the LA was justified in offering the cheaper option.[83]

Second toilet. A related issue that may arise concerns whether the needs of the disabled occupant -and/or the basic needs of the rest of the family, to void bowel and bladder – mean that a second toilet is required. For example, in one case:

[81] Local Government Ombudsman. *Sunderland City Council* (16 007 277), 2017, para 18.
[82] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, para 7.29.
[83] Local Government and Social Care Ombudsman, *Leicester City Council* (17 019 247), 2018, para 15.

Disabled occupant, toilet access, children having to use car park outside as toilet. A man lived in a flat with his wife and three children, aged eight to 17. He used a wheelchair and could not control his urine and bowels. There was only one bathroom/toilet in the property. If it was in use, he was at risk of wetting himself. Equally, he would need to be in the bathroom for a long time; in which case his children sometimes had to use the car park outside as a toilet.

The ombudsman held that the local authority should at least seek and consider the medical evidence and possible need to provide an additional bathroom in such circumstances.[84]

In such a case, the needs of the disabled occupant physically to access the toilet, reasonably easily, would at least be arguable. And, on any common-sense view, the basic needs of the children – albeit not disabled – would clearly be a factor to weigh up. With decisions being based on each individual case, on the evidence, and on the degree of need of both disabled occupant and others living there.

Sometimes applications are made for an additional toilet when a child with autism occupies the family toilet for long periods of time – because of autism-related behaviour, rather than a physical disability. This then means the rest of the family may be denied access; alternatively, if the family are using the toilet, then the autistic child may become distressed or frustrated.

Such applications are sometimes refused on the grounds that, physically, the autistic child has access to the toilet. And, on the safety issue, the application is refused because there simply is no safety issue; it is characterised as a convenience matter only.

Nonetheless, the relevant words in section 23 of the HGCRA are: "*facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a lavatory, or facilitating the use by the disabled occupant of such a facility*". It may be perhaps be maintained, at least in some cases, that consideration of an additional toilet facility, in the particular circumstances, may be called for. This would be in order to provide "reasonable" access, as well as to make use easier (facilitate). As long as it can be argued that this is clearly due to the disability, and not a case of a family simply wanting additional facilities for convenience.

[84] Local Government Ombudsman, *Westminster City Council* (17 008 525), 2018.

Furthermore, as already noted, guidance does in any case state that the views of parents must be taken seriously when deciding what is required, as well as the needs of other children in the household – and the needs of parents as carers.[85] And certainly high maintenance care could be mightily assisted with everybody having reasonable access to a toilet.

ADAPTATIONS AND CONSIDERATION OF EXISTING SPACE

Sometimes decisions about home adaptations for children centre on whether existing space can be used – or whether the disabled child's' needs necessitate the creation of extra living space. For instance, some form of extension to structure, or conversion of existing structure – for instance, loft to additional bedroom, or outhouse to useable space.

The general principle to apply is that the local authority is obliged to offer to meet the need in the most cost-effective way – but no more. As long as it can demonstrate that the cost-effective option is capable of meeting the need.

In the Leeds High Court case, the local authority successfully argued that it was not necessary to convert an outhouse for the storage of equipment for two children, both with cystic fibrosis. In the light of their current needs, the equipment required could reasonably be stored in the main dwelling.[86] In another case involving a disabled child:

No downstairs extension required for disabled boy. A local authority reasonably argued that it was not necessary to provide a downstairs extension for a bedroom and bathroom, to meet the needs of a woman's disabled son. The local authority proposed instead conversion of the dining room; her disabled son would still have access to sleeping and bathing facilities, as well as access to a principal family room (although the family could not eat altogether). The ombudsman found in favour of the local authority; the cost difference between the two options was £8000 as opposed to £30,000.[87]

Contrast a case in which the local authority failed, when considering existing space, to consider the needs of a foster child with special needs living with the family:

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[85] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, paras 7.17 - 7.18.
[86] *R(L) v Leeds City Council* [2010] EWHC 3324 (Admin)
[87] Local Government Ombudsman. *Sunderland City Council* (16 007 277), 2017.

Existing space: failing to take account of the special needs of a foster child within the family. A local authority failed to take account of the needs of a foster child (not the disabled occupant in question, but with special needs and behavioural issues) in the family who was unsafe in the kitchen. It was proposing to convert existing space downstairs for a young man who had recently become quadriplegic following treatment for leukaemia.

However, this would have resulted in loss of the dining room (i.e., principal family room), and therefore forced use of the kitchen, which would have been entirely inappropriate. The ombudsman found, amongst various faults, that the local authority had not considered the views and information put forward by the family, nor had they considered the needs of the fostered child whom they themselves had placed with the family.[88]

Thus, when a local authority approved a shower and toilet adaptation downstairs for a seriously ill and disabled woman but did not accept that a family room should be retained, the ombudsman found maladministration. The room to be sacrificed was the only one where the family could sit together; the hoist, hospital-type bed and other medical treatment she needed meant that there was no space to use the front room.[89]

In terms of extra space, it may be important under the HGCRA to distinguish the needs of the disabled child from any general overcrowding issue.

Extra bedroom for a child: required because of disability related need or an overcrowding matter? In one legal case, parents applied for a DFG to convert the loft into an extra bedroom for one of their children who was autistic. This was so he could have a bedroom to himself; he was currently sharing with another brother. One of the local authority's arguments was that the additional bedroom was an overcrowding issue, and not to do with disability needs.

This argument fell away; had he not been autistic, which resulted in him in attacking his brother during the night, a separate bedroom would not have been required – they could have gone on sharing. The issue was not ultimately and legally overcrowding or access to a bedroom therefore, but safety deriving from the disabled occupant's needs.[90]

SHARED CARE

Providing equipment and adaptations in a shared care setting is sometimes considered. It need not be only separated parents; it could be other relatives

[88] Local Government Ombudsman. *Kirklees Metropolitan Borough Council* (07/C/05809), 2008.
[89] Local Government Ombudsman. *Leeds City Council* (05/C/13157), 2007,
[90] *R(B) v Calderdale Metropolitan Borough Council* [2003] EWHC Admin 1832, High Court, para 19; [2004] EWCA Civ 134, Court of Appeal, para 9.

with whom the child spends regular time; it could for example be a split between a person's mother and foster carers (for instance, when the mother was too ill to care for her daughter all week).[91]

The duty to provide in both settings, and the extent to which a second dwelling should be adapted and equipped, will depend on assessed need. There is no automatic right, for example, to have one dwelling mirror the other. The nature of the dwellings might differ, and therefore correspondingly the type of equipment or adaptation required. It might depend on how much time the child spends in the second dwelling; relatively short, limited, periods of time might demand, for instance, less adaptation or equipment.

In terms of legal responsibility for the second dwelling the position would arguably be as follows.

Shared care: ordinary residence. First, in social care, the CSDPA requires that the child be legally "ordinarily resident" within the local authority. The definition of ordinary residence is a person's "abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration".[92]

Shared care: CSDPA 1970. Second, however, section 2 of the CSDPA arguably does not explicitly confine provision to one dwelling only. The gateway to provision is the child having ordinary residence within the local authority; if the needs call for it, there would appear to be nothing to stop the local authority assisting the child in two dwellings.

The CSDPA uses the word "home" in two of its key paragraphs (concerning practical assistance, adaptations and additional facilities).

A child could effectively have two homes in a shared care arrangement. This could be the case, even if the second dwelling were in the area of a different local authority; the child would still be ordinarily resident in the first (and main) local authority. Thus, this local authority, dependent on assessed need,

[91] *CD v Isle of Anglesey* [2004] EWHC 1635 (Admin), High Court.
[92] *R v Barnet London Borough Council, ex p Shah* (1983) 2 AC 309, House of Lords.

could arguably incur a duty in relation to both dwellings, even if the second of these were out of area.

(It is sometimes suggested that provision of equipment in a second home, which was out of area, would not be legally required or permitted of the local authority of ordinary residence. However, it is not clear to the author that this is correct. This is because the provision of services and potentially equipment outside of the main home is clearly contemplated in general by section 2 of the CSDPA – which refers to outings, holidays, access to recreational facilities etc. Not only may these obviously be outside the main home but also could be in the area of another local authority. So why not equipment provision in a second, shared care, home?).

Shared care: Children Act 1989. Third, and in any case, section 17 of the Children Act requires only that the child be in the local authority's area (which is more general than being ordinarily resident). And the courts have held that a child can be in two areas at the same time.[93] In which case, section 17 responsibilities could apply to both local authorities, if the dwellings are in different local authority areas.

Furthermore, if a disabled child is looked after, then the local authority has a duty to ensure that accommodation is suitable for the child.[94] This could include consideration of adaptations – as the court pointed out in a case when a disabled teenage girl split her time each week between her mother (who had a long-term illness) and longstanding foster carers.[95]

Shared care: disabled facilities grants. Fourth, as far as housing legislation is concerned and DFGs, the HGCRA refers to a dwelling being the disabled occupant's only or main residence. It is difficult to see how a child could, legally, have two only or main residences. Assuming this is correct, then a DFG would be available for one dwelling only. However, under the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002, there is a wide discretion to assist with housing, including with adaptations. So, this could in principle be used to assist with adaptations to a second dwelling. Guidance states just this:

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[93] *R(Stewart) v London Borough of Wandsworth* [2001] EWHC Admin 709, para 28.
[94] Children Act 1989, s.22.
[95] *CD v Isle of Anglesey* [2004] EWHC 1635 (Admin), High Court.

- *"The legislation requires the provision of DFG where a disabled applicant intends to use the property as their only or main residence. This can discriminate against meeting the needs of disabled children whose parents have separated and joint custody has been awarded. It can also cause discrimination for disabled children who spend more than half of their time at residential schools and colleges but who wish to return to a family home during the holidays. Authorities can use their discretionary powers in considering multiple applications to adapt the homes of disabled children in these situations to ensure that the service is equally available to all".*[96]

COMMUNICATION AIDS

Communication aids required by a child at school, with an education, health and care (EHC) plan in place, would often be regarded as falling within the educational part of a plan – as an integral teaching and educational aid. In the same way perhaps as the Code of Practice states that speech and language therapy would normally, although not necessarily always, be educational in nature and therefore fall within that part of the plan:

- "*Decisions about whether health care provision or social care provision should be treated as special educational provision **must** be made on an individual basis. Speech and language therapy and other therapy provision can be regarded as either education or health care provision, or both. It could therefore be included in an EHC plan as either educational or health provision. However, since communication is so fundamental in education, addressing speech and language impairment should normally be recorded as special educational provision unless there are exceptional reasons for not doing so*".[97]

However, to the extent that a communication aid did not fall within the educational part of the plan, or within the health part of the plan – then section 2 of the CSDPA 1970 covers "assistance to the child in taking advantage of available educational facilities" – which a communication aid clearly would be providing. It may be the case, for instance, that a communication aid made available at school to a child, by the school, is not made available within the child's home. But that its availability within the home would greatly assist with educational matters; in which case, again, depending on the individual case, section 2 of the CSDPA might apply.

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[96] Home Adaptations Consortium. *Home Adaptations for Disabled People: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013, para 7.31.

[97] *Department of Education; Department of Health. Special educational needs and disability code of practice: 0 to 25 years: statutory guidance for organisations who work with and support children and young people with special educational needs and disabilities*. London: DoE, DH, 2014, paras 9.74.

CHARITABLE FUNDING FOR EQUIPMENT

If a local authority determines, under section 2 of the CSDPA, that it is necessary to meet a child's needs, then it must do so. As noted above, lack of resources is not a defence to non-performance of the duty. However, sometimes parents are directed to charities to provide what is required. The question that may arise is to what extent this is acceptable.

The answer is generally, arguably, as follows. If a charity were able to meet reliably the identified need, both according to what has been assessed as needed, and with reasonable speed, then there would appear to be little legal objection to a need being met in this manner.

However, were the charity to be unable or unwilling to meet the need, either wholly or partly – and within a legally reasonable period of time – then clearly the local authority could not claim to be discharging its duty. This point has emerged in some legal and ombudsman cases. For instance, when a blind woman was referred to a local charity for equipment:

Wishful thinking about a voluntary organisation grant. A local authority declined to meet a visually impaired woman's needs under the Care Act on the grounds that a local voluntary organisation would give her a grant for technology to access the Internet. But the grant was discretionary, and the local authority did not consider how she would manage, were the grant not forthcoming. This was maladministration.[98]

In a recent legal case, a local authority failed to record an eligible need in the case of a man, newly in a wheelchair following an accident and with mental health needs – because he was currently being helped by a charity. Even though the charity had stated that it was unlikely to be able to continue to do so. The judge stated that it was essential that the eligible need was recorded; which would mean, of course, the local authority would be ready to step in if or when the charity dropped out.[99]

The following case illustrated the same issue, and the need to avoid the availability of charitable assistance from clouding assessment of need – in this

[98] Local Government Ombudsman*, London Borough of Hammersmith & Fulham* (15 011 661), 2016, para 24
[99] *R(Antoniak) v Westminster City Council* [2019] EWHC 3465 (Admin), para 28.

case, in relation to a six-year period covering the person's time as both a child and adult:

Charitable help obscuring the lack of a full assessment. Over a period of six years, the local authority failed properly to assess the needs of the person, first as a girl and then as a woman. She had multiple and profound mental and physical disabilities. However, it had assessed a need for weekend respite care to be provided at a care home; but when the charity providing this care was forced to close the home on Sundays, the local authority stated that it could not be held responsible for this effective withdrawal of service. It did not respond with a formal reassessment that would have had to conclude that either there was no longer a need, or that it was in breach of its duty to meet the need. Instead, it simply denied its commitment to the family. The local ombudsman found maladministration.[100]

(**Note**. Charities can of course determine in what circumstances they offer help. Some may state that they will help when there is no legal duty on the local authority or NHS to do so. However, this begs the question of course as to when there is such a legal duty. The question runs the risk of becoming circular.

Many years ago, the author contributed to a piece of work for Disabled Living in Manchester, analysing how a Disability Fund, which Disabled Living and the Cooperative Bank ran, was used to fund equipment. Of the applications analysed, and the reasons given by statutory services for those applications, most related to lack of funding, long waiting times, blanket policies not to provide certain types of equipment, and legally unexplained statements that people did not meet the statutory criteria. In other words, there seemed little legal rhyme or reason, other than the practical inability or unwillingness of statutory services to provide. A significant number of the reasons given by the statutory services involved seemed legally questionable).[101]

SPEED OF ASSESSMENT

The CSDPA 1970 itself contains no timescales for assessment, nor does the Children Act 1989 in relation to the assessment of children in need.

However, statutory guidance does set out both principles and timescales. Although this guidance refers primarily to the Children Act, it must be remembered that section 17 covers children in need; and that the definition of children in need includes disabled children. So, it is at least arguable that the following guidance applies to disabled children and, by extension, to assessment under the CSDPA 1970:

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[100] Local Government Ombudsman. *North Yorkshire County Council* (01/C/03521), 2002.

[101] Winchcombe, M; Mandelstam, M. *Getting on with our lives? A study of the experiences of people who require equipment for independent living*. Manchester: Co-operative Bank, Disabled Living, 2006, pp.23-24.

- (**timeliness**) "*The timeliness of an assessment is a critical element of the quality of that assessment and the outcomes for the child. The speed with which an assessment is carried out after a child's case has been referred into local authority children's social care should be determined by the needs of the individual child and the nature and level of any risk of harm they face. This will require judgments to be made by the social worker on each individual case*".

- (**acknowledging receipt of referral**) "*Within one working day of a referral being received, a local authority social worker should acknowledge receipt to the referrer and make a decision about next steps and the type of response required*".

- (**45 days to conclude assessment**) "*The maximum timeframe for the assessment to conclude, such that it is possible to reach a decision on next steps, should be no longer than 45 working days from the point of referral. If, in discussion with a child and their family and other practitioners, an assessment exceeds 45 working days, the social worker should record the reasons for exceeding the time limit*".

- (**interim provision**) "*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*".[102]

Some local authorities seem to maintain that a screening process for a disabled child will constitute the assessment (and compliance with the guidance) – and that later occupational therapy assessment and provision under the CSDPA constitutes the next steps, merely "service provision", rather than assessment.

The ombudsman may not always see it this way. In an adult case, the local authority argued that it had completed the assessment well within the target of 3 months for assessment; the reality was that the real assessment, conducted by an occupational therapist, as opposed to the screening, did not take place for 18 months:

Assessment and waiting times: substance, not form. A woman with cerebral palsy lived alone. She had arthritis in her right side, and weakness in both sides. She was unable to cope with shopping and domestic tasks. She worked full time as a teacher. At a first level assessment, completed reasonably quickly, a social work assistant stated that she

[102] Her Majesty's Government. *Working Together to Safeguard Children A guide to inter-agency working to safeguard and promote the welfare of children*. London: HMG, 2018, paras 76-84.

needed a second level assessment, and she was given a priority 2 rating. This should have been completed within three months, the longest waiting time allowed. In fact, it took nearly 18 months for a full assessment by an occupational therapist to take place.

The local ombudsman found maladministration. Not only because the assessment had been so delayed, but also because significant harm to the woman resulted.[103]

Assuming that delays in assessment and provision are a fact of life in some local authorities, the ombudsman may be up to a point be sympathetic. Bu would look to see what efforts had been made to avoid or mitigate unreasonable delay. In the following case, as an example, the system of priorities was over simple and seemed to be less than rational, because if a case was classed as complex it could not, also, be categorised as urgent:

Over-simple system of priorities. A disabled child had to wait 15 months for new seating, including a 12-month wait for assessment. The assessment had been prioritised as complex, which meant that it was on a longer waiting list than existed for cases categorised as emergency or simple. The ombudsman concluded that the system of priorities was 'over-simple', because within the category of complex cases there was 'no provision for relatively simple solutions to tide people over until a full assessment' could be made. Furthermore, there was no provision for treating some cases more urgently within the 'complex' category, even though they were not emergency in nature. This overly simple system meant that the child's needs were not met promptly and was maladministration.[104]

In such a case, the ombudsman might look for mitigating factors; whether the local authority had considered other ways of expediting on occupational therapy assessment – for instance, by drawing on NHS therapists, its therapists working with adults or therapists working in private practice.

[103] Local Government Ombudsman. *London Borough of Ealing* (97/A/4069) 1999.
[104] Local Government Ombudsman. *Rochdale Metropolitan Borough Council* (93/C/3660), 1995.

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