

Hillingdon Parent Carer Forum conference

Children & Families Act 2014 & Care Act 2014 – Know Your Rights

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Agenda for Day

- 10.00-11.15 – Children and Families Act 2014 (CFA)
- 11.15-11.30 – Break
- 11.30-12.30 – CFA (continued)
- 12.30-1.15 – Lunch
- 1.15-2.30 – Care Act
- 2.30 – Close

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

Core Message

DON'T PANIC...

- Evolution not revolution
- Opportunity to clarify and cement duties
- We are all in the same boat...

Some basics

1. Domestic law

- a. Acts of Parliament – eg Children Act 1989
 - i. Difference between powers and duties
- b. Regulations – eg SEN and Disability Regulations
- c. Rules, Directions, Orders etc

2. Case Law – what does ‘precedent’ mean?

3. Guidance

- a. Statutory
- b. Non-statutory

Duties not to discriminate

1. Equality Act 2010

1. Direct discrimination
2. Indirect discrimination
3. Discrimination by association
4. Failure to make reasonable adjustments

2. Human rights

1. Article 14 ECHR
2. Requires another ECHR right – eg Article 8
3. Brings in other international law principles, eg children's best interests

CFA - Importance of s 19 principles

Section 19 CFA provides that:

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

the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

Applies to everything done under CFA

Strategic duties

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

Support from school

- Presumption in favour of maintained nursery school, mainstream school or mainstream post-16 – section 34
- SEN support – four part cycle
 - Assess
 - Plan
 - Do
 - Review – all funded via notional SEN budget + top up
- Governors' best endeavours duty – section 66

Health / Education / Social Care interface

- Key existing law re social care / health
 - Children Act 1989 section 17 / Working Together to Safeguard Children (2015)
 - Assessments of children in need in 45 working days
 - Immediate response in urgent cases
 - Requirement for child in need plan
 - National Framework for Children's Continuing Healthcare
 - Applies to 'complex' cases – inc behaviour
 - Multi-agency assessment / decision in 8 working days

Health / Education / Social Care interface

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

Health / Education / Social Care interface

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

Health / Education / Social Care interface

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

Health / Education / Social Care interface

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

Health / Education / Social Care interface

Case study

- Assessment concludes child with autism needs four hours per week personal care and six hours per week short breaks
- Both of these are services which can be provided under CSDPA
- Therefore must be specified in Plan and provided

For more detail search 'JL v Islington' on BAILLI

Health / Education / Social Care interface

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

Personal Budgets

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

Personal Budgets

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

Personal Budgets

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

Personal Budgets

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

Personal Budgets

Case study

- EHC Plan specifies three hours per week speech and language therapy as special educational provision
 - LA has block contract with charity provider therefore no duty to make direct payment
- Same Plan specifies four hours per week of short break care (social care service)
 - No objection re parental capacity to manage payments therefore DPs must be made.

Local Offer

- C&F Act section 30
 - Requirement to publish information about provision expected to be available within and outside LA's area
 - Must consult and publish comments about local offer at least annually (ie first set of published comments now due)
- Regs 53-57 & Sch 2 SEN and Disability Regs 2014
 - Who to consult and involve
 - Requirements as to publication of comments
 - Requirements as to publication of Local Offer itself

Local Offer

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

Local Transition Plans

- Much of detail about transition to new system left to Local Authorities
- Statutory guidance - 'Transition to the new 0 to 25 special educational needs and disability system' – reissued for 1 September 2015
 - Each LA must have local transition plan from Sept 14
 - Para 5.5-5.8 for requirements of the plan – order of transfer of statements, details of transfer review process (EHC assessment), arrangements for LDAs etc
 - Must be consultation with parents and CYP (as a result of section 19) in preparing the plan.

CFA 2014 – Top Three Challenges (1a)

- The Local Offer

- *R (L and P) v Warwickshire CC* [2015] EWHC 203 (Admin)
- Ground D – paras 74-80.
 - Local Offer deficient in relation to 16 of the matters prescribed by Schedule 2 to the 2014 Regulations.
 - Proposed Local Offer falls ‘a considerable distance short of the statutory requirements’

CFA 2014 – Top Three Challenges (1b)

- The Local Offer
 - Basic requirement of all Local Offers is to provide the information required by schedule 2 to the Regulations
 - Vital not to lose second purpose, see Code at para 4.2
 - ‘To make provision more responsive to local needs and aspirations’
 - LAs should already be seeking comments in accordance with regulation 56 (and s 27)

CFA 2014 – Top Three Challenges (2)

- Transition to EHC Plans
 - Every LA required to have its Local Transition Plan in place
 - See ‘Statutory guidance - ‘Transition to the new 0 to 25 special educational needs and disability system’
 - Transfer review requires the local authority to carry out an EHC needs assessment in accordance with Regulation 6
 - New advice required unless parents, professional and LA agree to use old advice

CFA 2014 – Top Three Challenges (3)

- The Joined-Up Approach
 - Health
 - Clear duty on CCGs to arrange provision if in plan
 - Challenge seems to be getting health to table
 - Social care
 - Real confusion as to what is required by the CSDPA 1970 (section H1)
 - Different entitlement to direct payments
 - Absence of Tribunal appeal right
 - Including outcomes...(although note pilot re HSC)

School Transport

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

Short Breaks

- Relevant statutory duties
 - CSDPA 1970 s 2 – home-based (s 2(1)(a)) and community-based (s 2(1)(c))
 - CA 1989 s 17 and schedule 2, para 6(1)(c)
 - Provide services ‘to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring’.
 - Breaks for Carers of Disabled Children Regulations 2011
 - CA 2004 s 11 – safeguarding and promotion of children’s welfare in carrying out functions
 - CFA 2014 s 19 – ‘best possible outcomes’

Duties to parent carers

- Section 97 – parent carers’ needs assessments
 - In force 1 April 2015
 - Inserts new sections 17ZD-ZF into CA 1989
 - Requires PCNA to be carried out either on request or where appearance of need (s 17ZD(3))
 - Must have regard to well-being of parent carer and need to safeguard and promote welfare of disabled child (s 17ZD(10))
 - May be combined with other assessments (s 17ZE(3))
 - cf new ‘Young Carers Assessments’

Duties to parent carers

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

Duties to parent carers

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

New inspection framework

- Ofsted / CQC consultation
 - Search 'Local Area SEND consultation'
- Deadline – 4 January 2016
- Inspection of local areas' effectiveness in identifying and meeting needs
- Joint inspection of LA / Health
- Attempt to focus on outcomes not process
- Watch this space...

Transition - Mental Capacity

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

Transition - Mental Capacity (2)

The principles

- Section 1 MCA
 - Presumption of capacity
 - ‘All practicable steps’ to help make decision
 - Right to make unwise decisions
 - All acts and decisions for person who lacks capacity must be in their best interests
 - Requirement for ‘least restrictive’ option

Transition - Mental Capacity (3)

General approach to mental capacity

- Section 2 MCA:

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

- Section 3 MCA

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

- Section 4 MCA

- Detail in relation to best interests decision making

Care Act - Introduction

Care Act 2014

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

Care Act – Introduction (2)

- Claimed to be ‘most significant reform of care and support in more than 60 years’
- Described by one commentator as the merger of social work practice, values and ethics with statute
- BUT in fact, fundamentals of previous system (assess, decide, provide) remain untouched

Care Act – Introduction (3)

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

Care Act – Well-being duty

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

Care Act – Market shaping

- Promoting diversity and quality in provision of services – section 5
 - LAs must ‘promote the efficient and effective operation of a market in services for meeting care and support needs’
 - Outcome – that people with care and support needs will have
 - A variety of providers to choose from
 - A variety of high quality services to choose from
 - Sufficient information to make an informed decision

Care Act – Market shaping (2)

- Promoting diversity and quality in provision of services – section 5
 - Sub-section 2 – LAs must have regard to:
 - The need to ensure they are aware of current and likely future demand for such services and how providers might meet that demand
 - Enabling adults to participate in work, education or training
 - The importance of ensuring the sustainability of the market and fostering continued improvement in quality (inc workforce)

Care Act – Market shaping (3)

- Promoting diversity and quality in provision of services – section 5
 - Sub-section 4 – when commissioning, LAs must have regard to ‘the importance of promoting the well-being of [service users]’
- See Care Act guidance at Chapter 4, inc
 - 4.4 – LAs to review commissioning
 - 4.6-4.7 – definition of ‘market shaping’
 - 4.12 re outcomes and 4.21 re quality
 - 4.27 re ‘value for money’ (etc etc!)

Care Act – Transition

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

Care Act – Transition (2)

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

Care Act – Transition (3)

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

Care Act – Transition (4)

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

Care Act – Transition (5)

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

Care Act – Transition (6)

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

Care Act – Assessment

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

Care Act - Eligibility

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

Care Act – Eligibility (2)

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

Care Act – Eligibility (3)

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

Care Act – Care Planning

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

Care Act – Care Planning (2)

- Section 25 – care / support planning
 - Specify needs
 - Specify which needs meet the eligibility criteria
 - Specify needs LA is going to meet and how it is going to meet them
 - Include personal budget
 - Includes advice and information on what can be done to meet or reduce needs and prevent the development of future needs
- Duty to take all reasonable steps to agree plan

Care Act – Personal Budgets

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

Care Act – Direct Payments

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

Session 2 – Charging

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

Care Act - Advocacy

- Sections 67-68
 - Section 67 – advocates must be involved in assessment and care planning where
 - Individual has substantial difficulty in one or more areas
 - No appropriate person to represent and support
 - Role of advocate – to ‘represent and support’ for purpose of ‘facilitating...involvement’
 - Section 68 – safeguarding enquiries and reviews
 - Advocacy Regulations (No 2) – requirements re qualifications of advocates and process

Care Act - Safeguarding

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

Dispute resolution

- Tribunal (if appeal right exists)
 - Social care and health pilots – effective remedy?
- Formal complaint
 - Children Act complaints process
 - NHS complaints process
 - Ombudsmen (LGO / PHSO)
- Judicial review
 - Deaf CYP will often be eligible for legal aid
 - Specialist advice required asap

Conclusions

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

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The logo for Monckton Chambers is a dark red rectangle containing white text. On the left is a large, stylized letter 'M'. To its right, the word 'MONCKTON' is written in a bold, sans-serif font. A thin horizontal line is positioned below 'MONCKTON', and below that line, the word 'CHAMBERS' is written in a smaller, spaced-out, sans-serif font.

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