‘Cemented to the floor by law’: Respecting legal duties in a time of cuts[1]

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Introduction

1. This paper outlines the central legal duties in relation to disabled children and their families with which public bodies must comply.[2] Given the increasing realisation of the damage the current spending cuts are likely to do to disabled children’s services, an understanding of what the law requires in this area is more important than ever.

2. This paper is aimed at commissioners, managers and professionals working in local authorities, Primary Care Trusts (PCTs) and other public bodies. It should not of course be used in place of specific legal advice in relation to individual cases. It does however set out what in general terms will be some of the most important legal duties to consider when funding decisions are being taken. It is also hoped that this paper will be useful for parent campaigners and local groups who want to work with public bodies to defend the recent improvements to disabled children’s services. A specific paper focussing on explaining the law to families will be published by Every Disabled Child Matters in January 2011.

3. The recent comprehensive spending review (CSR) confirmed cuts to loverall local authority budgets. Anyone concerned with disabled children and their

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1 This paper draws heavily from an earlier paper entitled *‘Defending services for disabled children: using the law to fight the cuts’*, produced for the Community Care Law Reports Seminar in November 2010 and published at (2010) 13 CCLR 565. CDC and the author are grateful to Legal Action Group for permission to re-produce extracts from this paper.

2 Further detail on these duties and many other powers and duties relevant to disabled children and their families can be found in S Broach, L Clements and J Read (2010), *Disabled Children: A Legal Handbook* (Legal Action Group, London, £40), available at http://www.lag.org.uk/

families will already be familiar with stories of tightening eligibility criteria, blanket reassessments and the withdrawal of supposedly discretionary services.

4. Writing for The Guardian website on the evening of the CSR (20th October 2010), Polly Toynbee suggested that local authorities will be 'obliged to cut almost everything not cemented to the floor by law'. So the question then becomes to what extent vital support services for disabled children, individually or collectively, are 'cemented to the floor' by enforceable legal duties?

5. Now more than ever it is vital to understand with precision what local authorities and other public bodies *must* do to support disabled children and what they *may* do, in other words the distinction between duties and powers.[3] Yet in far too many vital service areas relating to disabled children, the distinction between duties and powers is poorly understood if considered at all. The reality in many areas is that *everything* provided for disabled children is treated as discretionary, as opposed to other local authority functions such as child protection investigations which are (properly) recognised to be required by law. In fact, as this paper sets out, very many of the services provided to disabled children are provided under duties, not powers. Once the condition(s) for the duty to arise are met there is no discretion – the service must be provided. Importantly, any failure to meet duties may well result in an application for judicial review[4] being brought against the public body in the High Court, dealing with which will be an unnecessary, expensive and time-consuming distraction for hard-pressed staff.

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3 In general terms, duties are created when statutes, regulations or other forms of legislation contains mandatory words such as 'must' and 'shall'. Powers are created when legislation uses discretionary words such as 'may'. There is a further important distinction between 'specific' duties, which are owed to individuals and will be enforced by the courts and 'general' or 'target' duties which are owed to classes of people (e.g. all children 'in need') and which may not, on their own, be enforced by the courts in relation to a single individual. Failure to comply with a duty or a failure to exercise a power fairly, rationally and reasonably may result in the High Court ordering a public body to comply with the law following an application for 'judicial review'.

4 An application for judicial review can be brought by anyone with sufficient 'standing', i.e. interest in the decision in question. This will always include both a disabled child and their direct family members in any situation where the provision of services to the child is in question. While judicial review is a remedy of last resort, the Courts have generally accepted that substantial disputes in relation to the care needs of disabled and otherwise vulnerable children are too urgent and important to be resolved through other mechanisms, for instance a local authority's complaints procedure. It is important to note that (i) public funding for legal challenges in this area is more widely available than in other areas, because it is the means of the child not the parent that are taken into account and (ii) the recent consultation on the future of legal aid does not suggest that the Government intends to withdraw or restrict legal aid in cases likely to be brought by disabled children, except in relation to education Tribunal appeals (but legal aid will still be available for education judicial review applications).

6. The distinction between powers and duties can therefore no longer be just of interest to a small group of specialist lawyers; it must be central to the debate about precisely which services to disabled children may be cut and which must be retained. This paper seeks to contribute to this debate. It first suggests a number of central duties owed to individual disabled children with which public bodies must comply in order to avoid acting unlawfully and in relation to which resources are either irrelevant or cannot answer the question of whether a service must be provided on their own. It then considers wider obligations which should inform local decision-making on the future of disabled children's services.

Part 1 – Key Individual Duties

7. A series of important judgments over the past 20 years have established that there are a number of duties owed to individual disabled children in relation to which either (i) resource constraints are an irrelevant consideration or (ii) resources may be relevant but the duty cannot be avoided by reason of resources alone. The following non-exhaustive list of these duties will be considered in the remainder of the first part of this paper:
    a. The duty to arrange the provision specified in a child's Statement of SEN (s 324(5)(a)(i) Education Act 1996);
    b. The duty to provide suitable education for children who may be without such education for any period (s 19(1) Education Act 1996);
    c. The duty to assess a child's need for 'social care' services and, where necessary, provide services to meet assessed needs (s 17 Children Act 1989, s 2 Chronically Sick and Disabled Persons Act 1970);
    d. The duty to accommodate children whose parents are 'prevented' from providing them with suitable accommodation and care (s 20(1) Children Act 1989); and
    e. The duty to respect disabled children's right to family and private life under Article 8 ECHR.

8. This paper also considers the duties on health bodies to assess disabled children's health needs and provide services to meet those needs, albeit that these obligations are nowhere as clearly defined as the equivalent duties on local authorities in relation to children's services (see however *R (Booker) v NHS Oldham*[5] for a recent case on the duty to provide health services to disabled

5 [2010] EWHC 2593 (Admin). All the cases referenced in this paper can be accessed free of charge at the BAILLI website – see www.bailli.org. BAILLI can be searched by either the name of the case or the 'neutral citation' – the numbers and letters provided in the

people, even where there may be insurance settlements to meet the cost of care). Each of these duties is considered briefly in turn below.

The Education Duties

9. Education is a 'fundamental right' for all children and young people, including disabled children and young people.[6] However, far too many disabled children and children with special educational needs (SEN) are not getting a suitable education at present.[7] There are two primary domestic law duties which guarantee the right to education for disabled children.

Duty to arrange provision in a SSEN

10. Firstly, for disabled children with special educational needs which are substantial enough to require their LEA to 'determine' the provision necessary to meet them through a making and maintaining a statement of special educational needs (SSEN), there is an absolute duty on the authority under s 324(5)(a)(i) of the Education Act (EA) 1996 to 'arrange' this provision. This duty only arises if (i) the local authority has accepted (or been required to accept by the Tribunal) that the child requires a statutory assessment[8] and (ii) following the assessment the authority then accepts (or is required to accept by the Tribunal) that the child's needs are such that a SSEN is required.[9]

11. In *R (N) v North Tyneside Borough Council (IPSEA Intervening)*[10] the Court of Appeal recently re-asserted the absolute nature of the duty to 'arrange' (in

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footnote reference. Many of the cases will also be reported in the Community Care Law Reports (CCLRs) and/or the Education Law Reports (ELRs), both of which should be available in legal libraries.

6 *Timishev v Russia* (2007) 44 EHRR 37. Decisions of the European Court of Human Rights (ECtHR) can be accessed free of charge via the Court's excellent search engine – google 'HUDOC' or go to http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en. Cases are usually found most simply by putting the name of the main party into the 'case title' field. ECtHR cases can be identified because the second party will be a country (e.g. Russia in this case).

7 *Lamb Inquiry: Special educational needs and parental confidence*, DCSF, 2009

8 Under s 323 Education Act 1996

9 See s 324(1) Education Act 1996; 'If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27, it is necessary for the local authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs'

10 [2010] EWCA Civ 135, [2010] ELR 312

practice fund) the provision set out in parts 3 and 4 of a child's SSEN.[11] Lord Justice Sedley reminded local authorities that 'there is no best endeavours defence in the legislation' in relation to any failure to implement the provision specified in a statement (judgment at [17]).

12. So once a parent has obtained a SSEN, ensured that Parts 2 and 3 accurately describe the child's educational needs and the provision required to meet them and obtained a suitable placement for the child in Part 4 (a process which may well involve one or more appeals to the Tribunal), then the local authority cannot escape its duty to arrange this provision by pleading a lack of human and financial resources. Of course, for some time many areas have attempted to reduce the numbers of SSEN issued. This has often been explained as being about reducing bureaucracy and channeling funds to the frontline, i.e. to schools. However, in the present financial climate this explanation may simply not wash with an increasing number of parents who will want the legal guarantee of suitable provision being made for their children which is afforded by a SSEN. This tension could well lead to an increase in the number of appeals to the Tribunal in coming years, which would be a disappointing way for scarce resources on all sides to be expended. Local authorities who wish to avoid unnecessary and expensive Tribunal appeals will need to make fair and reasonable decisions as to (i) whether a child meets the test for a statutory assessment, (ii) whether following an assessment the child meets the test for a SSEN to be made and maintained and (iii) what needs, provision and placement are required to be included in the SSEN.

Duty to children outside education – s 19 EA 1996

13. While only children with substantial special educational needs will benefit from a SSEN, all disabled children have the protection afforded by the duty found in s 19 EA 1996, which requires local authorities to make arrangements for the provision of 'suitable education at school or otherwise' for children who 'may not for any period receive suitable education'. Crucially, the House of Lords established in *R v East Sussex County Council, ex p Tandy*[12] that the duty now found in s 19 EA 1996 is not qualified by <u>any</u> resource considerations and that local authorities have an <u>absolute</u> duty to provide 'suitable' education to children to whom the duty applies.

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11 Part 3 of a SSEN specifies educational provision to meet a child's special educational needs; Part 4 specifies a placement or type of placement required by the child. Parts 5 and 6 of a SSEN, which deal with non-educational needs and provision, are not enforceable by the Tribunal and have little value to children or parents.

12 [1998] AC 714

14. Importantly, s 19(6) EA 1996 defines 'suitable' as meaning 'suitable to his age, ability and aptitude and to any special educational needs he may have' (emphasis added). So, if a disabled child who is outside education has any special educational needs, then the education offered to him must be suitable to meet those needs. The duty to offer education suitable to a child's individual needs was stressed by the Court in the recent case of *R (KS) v Croydon LBC*[13], where Croydon was found to be in breach of this duty in relation to a number of 14 year old unaccompanied asylum seekers, when the authority had not demonstrated, according to the particular circumstances of each child, how it had considered and resolved the question of what was suitable education. An even more extreme set of facts led to a finding of a breach of this duty in *R (B) v Barnet LBC*[14], where, given that the school proposed by Barnet had written a cogent letter explaining precisely why it could not meet B's complex needs, it is perhaps unsurprising that the Court allowed the application for judicial review and ordered Barnet to provide alternative suitable education for B.

15. So between the two duties considered above (sections 19 and s324(5)(a)(i) EA 1996), there appears to be a watertight scheme to ensure disabled children receive suitable education. However, the reality on the ground is of course very different. There will frequently be a dispute between parents and the local authority as to what the child's needs are and/or what constitutes suitable provision to meet them – including whether a child needs a SSEN at all. In relation to the s 19 EA 1996 duty, the courts will remain cautious in interfering in assessments of suitability by local authorities; see *R (HR) v Medway*[15]. However, the absolute nature of these fundamental duties remains and any local authority which does not act in accordance with them is likely to be required to act differently by the High Court if an application for judicial review is made.

The Children Act and Related Duties

16. While the higher courts have clarified the absolute nature of the central education duties to disabled children, the 'social care' duties remain rather more ambiguous and are certainly less well understood. The term 'social care' is used in this paper to indicate services other than health or education services provided to disabled children which are additional to the universal services from which all children benefit – schools, nurseries, playgroups etc. A social care

13 [2010] All ER (D) 206 (Oct)

14 [2009] EWHC 2842 (Admin), (2009) 12 CCLR 679

15 [2010] EWHC 731 (Admin), [2010] ELR 513

service will either be provided separately (for example a short break placement with a foster carer) or, more frequently in recent times, by providing additional support to enable the disabled child to benefit from mainstream opportunities (for instance a support
worker to accompany a child to a mainstream summer playscheme at a football club).

Section 17 CA 1989

17. The starting point for the provision of additional support to children 'in need' is section 17 of the Children Act (CA) 1989. All disabled children are children 'in need'; s 17(10)(c) and 17(11) CA 1989. As such, they are eligible for support under the general duty on local authorities established by s 17(1) CA 1989 to safeguard and promote the welfare of children in need in their area through providing a wide range of services.

18. It must be acknowledged at the outset that the House of Lords in *R (G) v Barnet LBC*[16] held (by a 3-2 majority) that s 17 CA 1989 does not create an individual entitlement to services. However, and importantly, *R (G) v Barnet* was decided in relation to the need for accommodation (i.e. housing). In relation to the very different question of whether there is an enforceable duty to provide services and support to disabled children, the answer depends firstly on whether the criteria in the statutory guidance accompanying s 17 CA 1989 are met and secondly on whether the duty in s 2 of the Chronically Sick and Disabled Persons Act (CSDPA) 1970 arises. Both these issues are discussed in detail below.

19. The mechanism for determining whether a local authority is obliged to provide social care services to an individual disabled child is an assessment. Although families and practitioners alike are frustrated by repeated and unnecessary assessments of disabled children, without a full and careful assessment it is impossible for a local authority to rationally determine whether it is obliged to provide services to the child.[17] The assessment duty therefore underpins every subsequent obligation towards disabled children. Any authority seeking to avoid carrying out full Children Act assessments by instead relying on the 'Common

16 [2003] UKHL 57

17 Even if there is no specific legal duty to assess a disabled child's needs, it is likely that an assessment would be required in order for the public body to 'ask themselves the right questions' as to what the child needs and whether services should be provided – a basic requirement of 'public law' (the law governing the actions of public bodies). See *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014.

Assessment Framework' (CAF) or similar risks being required to comply with its assessment duties by High Court, as the CAF is merely a 'policy' instrument which has no legal basis.

20. Section 17 CA 1989 does not impose an assessment duty on its face but the House of Lords in *R (G) v Barnet* stated that such an obligation was implied by the need to determine whether a child in need requires services (speeches of Lords Hope, Nicholls and Scott). Crucially, Para 3 of Schedule 2 CA 1989 allows an authority to assess the needs of a child under the CSDPA 1970 at the same time as carrying out an assessment under s 17 CA 1989 (see *R (MS) v Oldham MBC*[18] at [10]). This means that authorities should make their service provision decision under both the 1970 and the 1989 Acts following a single assessment.

Assessment Framework

21. The nature and extent of the duty to assess the needs of disabled children is set out in the extensive statutory guidance, *Framework for the Assessment of Children in Need and their Families* (Department of Health, 2000 – 'the Assessment Framework'). This is 'section 7' guidance, i.e. guidance issued under section 7 of the Local Authority Social Services Act 1970 which must be followed absent good reason not to do so (see *R v Islington LBC ex p Rixon*[19] at 123 J-K). It is highly unlikely that a simple lack of resources would persuade a Court that an authority had 'good reason' not to follow the Assessment Framework and (to date) authorities have generally accepted that they are bound by this guidance.

22. The central requirements of the Assessment Framework include the following:
    a. A decision on whether to assess a child should be made within *one working day* of any referral. If there is any realistic possibility that the child may need services, this decision should be positive, as there is a low threshold for community care assessment duties to be engaged; *R v Bristol CC ex p Penfold* (1998) 1 CCLR 315);
    b. An initial assessment must be completed within *seven working days*. This can be 'brief' but must address all the 'dimensions' set out in the Assessment Framework, including developmental needs (health, education, emotional and behavioural, etc), parenting capacity and family and environmental factors. An initial assessment should determine whether the child is 'in need', what services are required and how any

18 [2010] EWHC 802 (Admin)

19 (1998) 1 CCLR 119

services will be provided. The child must be seen as part of any lawful initial assessment;

c. Where a child has complex needs and/or requires services from more than one agency (for instance from the authority and the Primary Care Trust), a more in-depth core assessment should be completed *within 35 working days* of the date the initial assessment was concluded, involving all relevant agencies in the process.

23. The Assessment Framework therefore imposes a demanding assessment regime on local authorities. As the Court stated in *R (AB & SB) v Nottingham CC*[20] (at 306G-I), at the end of the assessment process it should be possible to see 'what help and support the child and family need and which agencies might be best placed to give that help'. This detailed picture must be drawn up quickly through working with families who often experience multiple difficulties and disadvantages. However, these strict requirements are for good reason, as delays and inadequate assessments can seriously damage the safety and well-being of children in need.

24. There is however no absolute obligation under s 17 CA 1989 to provide services to meet needs identified during the initial and/or core assessment. This is made clear at para 4.1 of the Assessment Framework, which states that the assessment should result in:

- An analysis of the needs of the child…
- Identification of whether and, if so, where intervention will be required to secure the wellbeing of the child…
- A realistic plan of action, including services to be provided, detailing who has responsibility for action, a timetable and a process for review.

25. Therefore, at the end of the assessment the authority must make a decision as to whether the child's needs are such (in their family context) that intervention is required to secure the child's well-being. If this is accepted, then the duty on the local authority is to produce a 'realistic plan of action' to show how these needs will be met.

Section 2 CSDPA 1970

26. This position appears to be complicated by s 2 CSDPA 1970, which imposes a specific duty to provide a wide range of services (in practice, almost every social care service a disabled child is likely to need apart from residential short

20 (2001) 4 CCLR 294

breaks[21]) if the authority is satisfied that such a service is 'necessary in order to meet the needs of that person'. The duty under s 2 CSDPA applies to disabled children as well as disabled adults; see s 28A CSDPA. It is well established that the duty under s 2 CSDPA 1970 cannot be avoided because of resource shortfalls; see for example *R v Kirklees MBC ex p Daykin*[22] at 525D. Further, if a service can be provided under s 2 CSDPA 1970 or s 17 CA 1989, it is provided under the 1970 Act, in essence because the more specific duty in the 1970 Act 'trumps' the general duty in the 1989 Act; see *R v Bexley LBC ex p B*.[23]

27. In practice however, this is likely to be a distinction without a difference, because the duty under s 2 CSDPA 1970 only arises if the authority is satisfied that it is 'necessary' to provide services. It is open to an authority to decide that it will only be 'necessary' to provide services to disabled children under the 1970 Act where, after assessment, a judgment is made that 'intervention is required to secure the well-being of the child', i.e. where the test in the Assessment Framework (in relation to the CA 1989) is made out.

28. What all the above comes down to is that while authorities must make a judgment, based on a careful assessment, as to whether an individual child requires support, once a judgment has been made that a child does need support, that support must be provided. Of course, an authority which determines that support is not required may be challenged in the High Court on an application for judicial review on the basis that the assessment fails to comply with the Assessment Framework or is otherwise unlawful and/or that the service provision decision is irrational or otherwise unlawful in the light of the assessment.

29. There is therefore an essential distinction between *judgment* and *discretion* in the provision of services for disabled children (and indeed many areas of public law). While an authority must exercise its *judgment* at the conclusion of an assessment as to whether services are necessary, if it concludes that services are necessary it has no *discretion* as to whether or not to provide services – the necessary services must be provided. This is certainly true in respect of s 2 CSDPA 1970 (under which the vast majority of services for disabled children will be provided) and almost certainly true under s 17 CA 1989 (primarily in relation to residential short breaks), as a result of the requirements of the

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21 Which will generally be provided under the s 17(6) CA 1989 general duty or the s 20(4) CA 1989 power unless the specific duty under s 20(1) CA 1989 arises; see below.

22 (1998) 1 CCLR 512

23 (2000) 3 CCLR 15

Assessment Framework for a 'realistic plan of action' to be drawn up to show how intervention to secure a child's well-being will be put in place.

Section 20(1) CA 1989

30. One further duty merits careful consideration in the context of disabled children's services. This is the duty under s 20(1) CA 1989 to provide accommodation to children who need it because (amongst other reasons) their parents are 'prevented' from providing them with suitable accommodation and care (s 20(1)(c)). In *R (G) v Southwark LBC*[24], the House of Lords confirmed that this specific duty must be complied with if the qualifying criteria are met.

31. In *R (JL) v Islington LBC*[25], JL's mother argued that the residential short break care that JL required was being provided under s 20(1) CA 1989 because she was prevented from providing the claimant with suitable accommodation and care by reason of a combination of JL's needs and her own needs. Mrs Justice Black rejected this submission on the facts of the case (judgment at [97]). However, Black J did accept that it was possible that a parent of disabled child could be 'prevented' from providing him with suitable accommodation and care such as to engage the s 20(1) CA 1989 duty. This duty could then be complied with by providing residential short break care (judgment at [82]). Importantly, Black J held that the s 20(1) duty would arise only if there was an 'actual crisis', not a 'possible or prospective' crisis. Black J also confirmed that s 20(1) CA 1989 imposes an absolute duty similar to that imposed by s 19 EA 1996, in relation to which resource constraints are irrelevant (see above). This was (in part) because s 20(1) concerns accommodation, which is a 'fundamental necessity' (judgment at [70]).

32. Given the strength of the CA 1989 s 20(1) duty and the increasingly desperate position in which many families with disabled children are likely to find themselves as a result of the global cuts to welfare benefits and public services, it is likely that further attempts will be made to establish that a disabled child is entitled to residential short breaks under s 20(1)(c) of the 1989 Act. Part of the potential importance of this in an individual case will be that *R(JL) v Islington* clearly establishes that eligibility criteria cannot be used to limit access to services where the s 20(1) criteria are met; judgment at [71].

Eligibility Criteria and 'Personalisation'

24 [2009] UKHL 26

25 (2009) 12 CCLR 322

33. In relation to the duties contained in s 2 CSDPA 1970 and s 17 CA 1989, *R (JL) v Islington* establishes that eligibility criteria can be lawful, so long as they (i) only limit the pool of children who are eligible for provision, not the amount of provision to be made to eligible children, (ii) do not prescribe a fixed maximum amount of support, (iii) are applied after (not instead of) a lawful assessment of needs and (iv) are set with due regard to the disability equality duty in s 49A DDA 1995 (see below). Breaches of the requirements summarised above persuaded Black J to strike down Islington's eligibility criteria (and resulting service provision decision in JL's case) as unlawful (judgment at [126]).

34. The judgment of Black J in *R (JL) v Islington* highlights the dangers inherent in public bodies seeking to apply standard formula to the determination of an individual disabled child's needs and eligibility for services. While the *JL* judgment means that lawful eligibility criteria are still theoretically possible, any lawful criteria would have to be so nuanced that they may be practically useless. It may use far less time and money for an authority to simply accept that it must assess disabled children's needs and make service provision decisions on an individual basis (perhaps using some very broad criteria for the test of whether services are 'necessary') than to design complex eligibility criteria and defend itself against the resulting legal challenges that will inevitably follow. The complexities inherent in any attempt to set eligibility criteria for disabled children's services may explain why, despite Black J stating that there was a 'pressing need for guidance' on eligibility criteria (at [125] in her judgment in *JL*), no such guidance has been forthcoming from central government.

35. As with eligibility criteria, the application of Resource Allocation Systems (RAS) and other 'personalisation' approaches familiar from adult social care is also problematic in relation to children's services. The potential risks associated with the RAS approach is that it breaks the link between the assessment of need and the service provision decision by inserting a process by which an 'indicative budget' is determined, very often based on a self assessment questionnaire rather than a lawful community care assessment. The judgment of the Court of Appeal in *R (Savva) v Kensington and Chelsea*[26] makes clear that while RAS schemes may be used as a 'starting point' to give an indication of the level of funding which may be required, they cannot dispense with a local authority's 'absolute duty' to meet assessed needs through services or direct payments[27] once it has concluded that such services are necessary (judgment at [7]). This is all the more so in the context of children's services given the possibility that

26 [2010] EWCA Civ 1209

27 Under s 17A CA 1989

they may be provided under the s 20(1) CA 1989 duty.

Conclusion

36. To conclude on children's services, there is an increasing gap between what the law requires and what policy encourages. While the policy direction over the past 10 years has been towards more flexible assessments, the application of complex eligibility criteria and the calculation of support packages through RAS schemes, the legal duties remain to assess an individual disabled child's needs, determine whether those needs should be met through the provision of services and if so provide services to meet needs. As budgets shrink and while the legal duties remain, it is likely that local authorities will increasingly be required by the Courts to comply with what the law mandates rather than what central or local government proposes as policy at any given time.

Health

37. By contrast to education and children's services, the duties owed to disabled children by health services (currently generally owed by PCTs) have frequently not been given significant consideration by the Courts. Further, much of the guidance given to PCTs in relation to disabled children (most critically the Children's National Service Framework) is non-statutory and only the most blatant disregard to non-statutory guidance is likely to result in a successful judicial review application. However, there are a number of important duties on PCTs which must be properly understood by commissioners and managers within both PCTs and their partner authorities.

38. Firstly, there are important general duties on PCTs to:
    a. Ensure that the views of disabled children and their families inform the planning and provision of health services, see s 242 NHS Act 2006;
    b. Co-operate with local authorities to 'secure and advance' the health of disabled children, see s 82 NHS Act 2006; and
    c. Co-operate with local authorities and others to 'safeguard and promote' the welfare of disabled children, see s 10 CA 2004.

39. Secondly, the fundamental duties on the Secretary of State under sections 1 and 3 of the NHS Act 2006 to secure the provision of a 'comprehensive' NHS are delegated to PCTs. This duty includes securing the provision of 'after-care' services for disabled children, which would encompass all the therapeutic and other health services disabled children may need.

40. Thirdly, although there is no explicit duty under the NHS Acts on PCTs to assess disabled children's healthcare needs, there is almost certainly an implied duty to do so, as there is in relation to children's services (see above). If nothing else, an assessment will be required so that PCTs can decide rationally and reasonably whether it is necessary to provide services to an individual disabled child. PCTs may have more flexibility in conducting an assessment that their colleagues in children's services as they are not bound by the Assessment Framework. However, it may well be at the very least good practice for PCTs to follow the Assessment Framework in many cases involving disabled children, and it may also be essential for PCTs to engage fully in a 'core assessment' process to enable their local authority colleagues to comply with their duties under the Assessment Framework.

41. Fourthly, where a PCT accepts (following assessment) that it is necessary to provide services to a disabled child, it will have a duty to do so under sections 1 and 3 of the NHS Act 2006. This will include provision of therapy[28], child and adolescent mental health services[29], palliative care services for children with life-limiting conditions and equipment services, including wheelchairs. The decision as to whether it is necessary to provide a particular piece of equipment or therapy to a disabled child must take full account of the child's Article 8 ECHR rights, including their right to develop their personality and function socially (see below). As with local authorities, once a PCT has exercised its judgment and found that a particular service or support is necessary, it will be unlawful for the PCT then not to provide it.

42. Fifthly, where a child has a 'primary' health need, the PCT may need to take lead responsibility for the child's care package and may have the duty to provide any 'short break' care the child requires; see *R (D) v Haringey LBC*[30]. A child with a 'primary' health need will be eligible for 'children's continuing care'. This must be distinguished from NHS continuing healthcare for adults, as generally adult care packages will an either/or responsibility for the local authority or the PCT whereas disabled children with significant health needs will generally need input from both the PCT and the local authority. The process of determining whether a disabled child is eligible for continuing care is prescribed in a new 'National

28 Unless sufficient therapy is being provided by the local authority through Part 3 of a child's SSEN, which should quantify and specify 'educational' therapy required, including generally speech and language therapy.

29 Which may also be required under the Mental Health Act 1983

30 [2005] All ER (D) 256

Framework'[31] and its accompanying Decision Support Tool. The continuing care 'pathway' established by the National Framework requires three phases to be followed – assessment, decision-making and arrangement of provision.[32] A PCT which failed to follow the National Framework would be acting irrationally and unlawfully.

Direct Payments

43. One important issue in relation to duties on PCTs is direct payments. At present, a PCT may not provide support to a disabled child (or adult) by way of a direct payment.[33] This situation is likely to change as section 12A of the NHS Act 2006[34] empowers PCTs to make direct payments, but this provision is not yet in force other than in a limited number of pilot areas. However, while PCTs generally remain prohibited from making direct payments to disabled children there is nothing to prevent PCTs transferring funds to local authorities[35] to increase direct payments made to disabled children under s 17A CA 1989. Moreover, the Courts have approved the concept of 'User Independent Trusts'[36] where PCT money is held in a separate trust and used to purchase a bespoke package of care for a disabled person – in effect, a virtual direct payment or 'individual budget'. PCTs cannot therefore simply resist requests for personalised care packages from disabled children and their families on the basis that they have no power to make direct payments.

Conclusion

44. It can therefore be seen that PCTs have parallel duties to those placed on local authority children's services departments in relation to disabled child. Where a disabled child has significant health needs, it will be necessary for the PCT to assess those needs (generally as part of a multidisciplinary core assessment) and then make a decision as to whether the child's needs call for the provision of services. In cases where the child has a 'primary' health need (and particularly where requiring the local authority to provide services would involve creating a

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31 *National Framework for Children and Young People's Continuing Care*, Department of Health, 2009

32 This of course mirrors the requirements on local authorities under the Assessment Framework

33 *R (Harrison) v Secretary of State for Health* [2009] EWHC 574 (Admin)

34 Inserted by s 11 Health Act 2009

35 Under s256 NHS Act 2006

36 See *Gunter v SW Staffordshire PCT* [2005] EWHC 1894 (Admin)

'substitute NHS'[37]), then the PCT may well have lead or even sole responsibility for the child's care package. Given the relative protection given to NHS budgets by contrast to children's services budgets in the CSR, the duties on health bodies (PCTs and whatever their successors may be) are likely to take on ever greater importance.

Article 8 ECHR

45. As a result of the Human Rights Act (HRA) 1998, a public body which fails to respect a person's rights to family and private life under Article 8 ECHR is acting unlawfully.[38] The nature and extent of these obligations is often poorly understood. In part this is because Article 8 is the most 'unruly' of the Convention rights[39], as its requirements are always intensely fact-specific. Despite this, Article 8 remains a powerful legal duty (through the HRA 1998) which can be used to protect services for disabled children.

46. It is important to remember from the outset that Article 8 requires respect for two distinct but linked rights, the right to family life and the right to private life. The right to respect for family life is more readily understood, and imposes a duty to respect all forms of family life, not just a traditional 'nuclear' family. However, the right to private life is particularly important for disabled children. Private life includes a person's ability to function socially[40] and a person's 'physical and psychological integrity'.[41] In effect, this means that disabled children have a qualified right under Article 8 (qualified in the ways set out below) to services and support to enable their personalities to develop and for them to function socially.

47. Article 8 provides that there shall be no interference with a person's right to respect for family and private life other than is (i) in accordance with the law, (ii) in pursuit of one of the specified legitimate aims and (iii) is 'necessary in a democratic society', in other words proportionate. It being obvious that

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37 *R (D) v Haringey*, as above

38 Section 6 of the Human Rights Act 1998. This duty applies to all public bodies, including local authorities and PCTs.

39 As described by Stanley Burnton J in *R (Wright) v Secretary of State for Health* [2006] EWHC 2886 (Admin)

40 *R (Razgar) v Home Secretary* [2004] 2 AC 368 per Lord Bingham at [9])

41 *Pretty v UK* (2002) 35 EHRR 1. The *Pretty* case concerned assisted suicide but the emphasis placed by the European Court of Human Rights on an individual's autonomy being protected by Article 8 ECHR applies equally to cases involving disabled children.

(for example) a decision to cut or withdraw services is an 'interference' with a disabled child's Article 8 rights (most likely both the family life and private life aspects), this interference must then be justified with regard to the three requirements above. All of the justifications must be established for an interference to be lawful.

48. It is likely that any interference will be in pursuit of a legitimate aim, either 'economic well-being' or 'the rights and freedoms of others' (i.e. the need to use scarce resources to meet the needs of as many people as possible). So the question will be whether the interference is (i) in accordance with the law and if so (ii) whether it is proportionate.

49. It is therefore obvious that the first thing a public body must do to avoid a breach of a disabled child's Article 8 rights is ensure that its actions are 'in accordance' with the law. Importantly, recent decisions of the European Court of Human Rights have established that 'law' for the purposes of Article 8 is not limited to primary or secondary legislation but may include administrative orders and instructions that do not, of themselves, have the force of law.[42] This means that a failure to follow statutory guidance, for example the assessment requirements of the Assessment Framework, may make any subsequent interference with a child's Article 8 ECHR rights not 'in accordance with the law' and as such unlawful.

50. Even if all the relevant law and guidance has been complied with, the final test under Article 8 ECHR is whether the decision is proportionate ('necessary in a democratic society'). The definitive statement of the law in relation to proportionality is found in the speech of Lord Bingham in *Huang v Home Secretary*.[43] Lord Bingham first reiterated that proportionality requires there to be a sufficiently important objective and a rational connection between the objective and the measures used and further that the means used must be no more than necessary to accomplish the objective. Importantly, Lord Bingham then added that the 'overriding requirement' was 'the need to balance the interests of society with those of individuals and groups'. This is therefore the ultimate 'balancing act' which Article 8 requires; for our purposes, the question is whether the wider economic interest justifies the decision to withdraw or reduce services to a particular child or family. Again, while answering this question requires a local authority (or the Court if the authority's decision is challenged) to exercise a judgment, if the judgment falls in the child's favour

42 See for example *Liberty v United Kingdom* (2009) 48 EHRR 1

43 [2007] 2 AC 167 at [19]

there is no discretion to cut or withdrawn services, as any such decision would breach Article 8 and thereby be unlawful (s 6 HRA 1998).

51. What about a situation where a child is not yet receiving services? Is there a 'positive' obligation under Article 8 for an authority to show respect for the child's right to family and/or private life through providing services? The answer is, in effect, that the same tests apply under Article 8 to a decision not to provide services as it does to a decision to cut or withdraw services, i.e. is the decision 'in accordance with the law' and, if so, is it proportionate?

52. It can no longer be in doubt that Article 8 may impose positive obligations on the state as well as prohibiting 'interferences' with an individual's private and family life. Positive action may be required under Article 8 in order to 'enable family life to continue' (*Anufrijeva v Southwark LBC*[44] at [43]) or to 'ameliorate and compensate' for restrictions experienced by disabled people (*Price v UK*[45]). In particular, Article 8 may positively require a service to be provided in order to ensure respect for a disabled child's human dignity, which is the 'very essence of the Convention' (*Pretty v UK* at [65]). So ensuring an individual disabled child can realise their human potential and live a life with dignity may require a public body to act as well as not to act.

53. The ECHR, including Article 8, is intended to guarantee rights which are 'practical and effective' not 'theoretical or illusory'; see for example *Airey v Ireland*[46] at [24]. The obligations on local authorities and other public bodies to help disabled children realise their rights to family and private life must be seen in this context. Ultimately, it may well be the case that the Convention and domestic law require the same thing, being that where intervention is necessary to secure the well-being of a disabled child, local authorities and others are under a duty to act and may be compelled to do so by the Court on an application for judicial review.

Part 2 – Wider Obligations

54. In addition to the central duties owed to individual disabled children, there are

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44 [2004] QB 1124

45 (2002) 34 EHRR 1285 per Judge Greve. This case involved the right to freedom from inhuman and degrading treatment under Article 3 ECHR but the principles also apply to the Article 8 rights.

46 (1979) 2 EHRR 305

also important wider obligations on public bodies which are taking decisions about the future of services for disabled children. This section will focus on three related duties:

a. The duties in relation to consultation imposed by the 'common law'[47];
b. The obligations created by s 49A of the Disability Discrimination Act (DDA) 1995, the general disability equality duty; and
c. The duty to have regard to the need to safeguard and promote the welfare of children established by s 11 of the Children Act (CA) 2004.

Duty to Consult

55. Firstly, the common law has established a requirement (as an aspect of procedural fairness) that there should be adequate consultation with affected individuals when important decisions are taken by public bodies. The key judgment in this area is *R v North and East Devon Health Authority, ex p Coughlan*[48]. The requirements established by the *Coughlan* judgment can be summarised as follows:

    a. Whether or not consultation is a statutory requirement, if undertaken it must be carried out properly;
    b. This requires that consultation:
        i. Be carried out when the proposals are still at a formative stage;
        ii. Provides consultees with sufficient reasons in support of particular proposals to allow an intelligent response to be made;
        iii. Provides adequate time for responses; and
        iv. Ensures that the responses are conscientiously taken into account when the ultimate decision is taken.

56. It is particularly important to note that the requirements of a consultation, once launched, are no different if there is a statutory duty to consult than if the public body has decided to consult voluntarily. Given that every local area will now have parents councils and other forums which may well have a legitimate expectation that they will be consulted if significant changes are proposed to be made to disabled children's services, it can be assumed that any failure by local authorities or other bodies to consult properly on their plans will be open to challenge, including by way of judicial review. However, the remedy for any failure to consult lawfully will be an order from the Court that the public body consult again, which may only delay rather than totally defeat any attempt to cut services.

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47 That is, the general requirements of English law, not found in specific legislation but emerging from Court judgments over time and enforced by the higher Courts.

48 [2001] QB 213

The Disability Equality Duty

57. A second important factor to consider in any service reconfiguration is the extent to which the public body has complied with its duty under s 49A Disability Discrimination Act (DDA) 1995. This duty applies to all aspects of the functions of public bodies, including decisions on individual cases (see *R (JL) v Islington LBC* and, most recently, *Pieretti v Enfield* [2010] EWCA Civ 1104), but is most frequently considered in relation to general decisions of public bodies. It should be noted that although the Equality Act 2010 has repealed most of the provisions of the DDA 1995, the s 49A DDA 1995 duty remains in force and is anticipated to remain so until April 2011, when it will be replaced by the relevant provision of the 2010 Act (section 149). The case law built up in relation to s 49A DDA 1995 is likely to remain relevant when the 2010 Act duty comes into force as the 2010 Act is intended to build not, not fundamentally change, the approach of the previous discrimination legislation including the DDA.

58. The duty on public bodies under s 49A DDA 1995 is to 'have due regard' to a range of specified 'needs' when carrying out their functions. The most important 'needs' for decisions on the future of disabled children's services are likely to be:
    a. The need to promote equality of opportunity between disabled persons and other persons (s 49A(1)(c)); and
    b. The need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons (s 49A(1)(d));

59. The s 49A DDA 1995 duty has been the subject of significant consideration by the Courts and some key principles have emerged:'
    a. Due' regard, as opposed to a duty merely to 'have regard', requires 'specific regard, by way of conscious approach, to the statutory criteria'; *R (Sanders) v Harlow District Council*[49] at [84];
    b. The duty has to be considered rigorously, with an open mind and in substance, when the relevant decision is taken; *R (Brown) v Secretary of State for Work and Pensions*[50] at [92];
    c. There should be some form of 'audit trail' or documentation to show that the duty was given due consideration at the appropriate time; *R (JL) v Islington* at [121]; and

49 [2009] EWHC 559 (Admin)

50 [2008] EWHC 3158 (Admin)

d. Active steps are required to be taken to promote equality of opportunity when relevant decisions are made; *R(E) v Governing Body of the Jews Free School*[51] at [213] (in the context of the equivalent provision in the Race Relations Act 1976).

60. In *R (Domb and others) v Hammersmith and Fulham*[52] ('Domb'), the Court of Appeal (at [52]) reviewed an extensive list of equality duty cases and summarised the requirements of s 49A DDA 1995 as follows:

> I take from those summaries in particular the observations that there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard, not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors, but is "the regard that is appropriate in all the circumstances"; that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind; and that it is a non-delegable duty.

61. What all this means in practice is that any public body proposing to cut the services it provides to disabled children must be able to demonstrate that it has had specific regard to the needs in s 49A DDA 1995, including the need to promote equality of opportunity for disabled children compared with their non-disabled peers and the need to take steps to take account of disabled children's disabilities, in reaching this decision. The public body does not have to actually ensure (for example) the achievement of equality of opportunity for disabled children – but it may be extremely difficult for a public body which is proposing a substantial cut to disabled children's services to show how it has had 'due regard' to the specified 'needs', particularly if it is taking no other measures to mitigate the impact of this decision.

62. *Domb* is perhaps the most interesting decision in relation to the role of the s 49A DDA 1995 duty in the context of the coming cuts. In this case, the Court of Appeal were asked to consider whether Hammersmith and Fulham had given due regard to the disability, race and gender equality duties in deciding to begin charging for home care services to disabled adults. Importantly, no challenge was made to a decision which had already been taken in the authority's budget-setting process that council tax would be reduced by 3%. Having taken this decision, the choice for the authority's cabinet was presented as being between (a) charging for services or (b) raising their eligibility criteria so that 'moderate'

51 [2008] ELR 445

52 [2009] EWCA Civ 941

needs would no longer be met.

63. A 12 week consultation process (about which generally no challenge was brought) included various equality impact assessments. Rix LJ, giving the leading judgment for the Court of Appeal, concluded that the authority had, in substance, had regard to the need to eliminate discrimination and promote equality of opportunity (judgment at [75]). However, Rix LJ was clearly troubled by what he described (judgment at [54]) as the claimant's 'big point', which was that the authority could not be said to have paid due regard to its equality duties when the options had been so limited by the decision to cut council tax. Rix LJ decided that this point could not be 'grappled with' in *Domb* because the budget decisions had already been taken. However, as a general observation he stated as follows (at [62]):

> I am far from saying, however, that in another case, it might not be necessary for a local authority to be able to demonstrate…that it had considered, in substance and with the necessary vigour, whether it could by any means avoid a decision which was plainly going to have a negative impact on the users of existing services.

64. In a short concurring judgment, Lord Justice Sedley made the same point in even more trenchant language (judgment at [78] and [80]):

> I agree that this appeal fails; but I do so with very considerable misgivings because the appeal itself has had to be conducted on a highly debatable premise – that the prior decision of the local authority that council tax was to be cut by 3% had to be implemented…
>
> …
>
> As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court.

65. The judgment of the Court of Appeal in *Domb*, and in particular that of Sedley LJ, is an open invitation to any group affected by a cut to services to challenge that decision under the equality legislation by attacking the high-level budgetary decisions which may have made such a cut 'inevitable'. To make this a reality, parents' forums and other local groups may need to start taking as keen an interest in their local authority's budget-setting processes as they do in the specific decision-making processes on the future of disabled children's services. Public bodies on the other hand will want to avoid the possibility of expensive and time-consuming challenges to strategic decisions by making sure that due regard is paid (and can be shown to have been paid) to the needs set

out in s 49A DDA 1995 when these decisions are taken.

The Safeguarding and Welfare Duty – CA 2004 s 11

66. Much of the analysis above also applies to the duty on local authorities established by s 11 CA 2004 to have regard to the need to safeguard and promote the welfare of children in carrying out their functions. At s 11(2), the 2004 Act states:

> *Each person and body to whom this section applies must make arrangements for ensuring that –*
>
> *i. their functions are discharged having regard to the need to safeguard and promote the welfare of children; and*
>
> *ii. any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.*

67. The duty is therefore framed in similar terms to the general equality duties. This duty has to be discharged in accordance with associated statutory guidance[53] which makes clear that decisions affecting children should be consistent with the five "well-being" criteria found in section 10 of the 2004 Act (an stemming from the Every Child Matters green paper), namely:
    a. Physical and mental health and emotional well-being;
    b. Protection from harm and neglect;
    c. Education, training and recreation;
    d. Making a positive contribution to society; and
    e. Social and economic well-being

68. It is therefore highly arguable that the same approach adopted by the Courts in relation to the equality duties should also be adopted if any challenge is made to a local authority's decision making under s 11 CA 2004. The essential question for the Court would be whether the authority could show that, in substance, any decision was taken with the need to safeguard and promote children's well-being firmly in mind. Again, it remains unclear how much leeway the Court will be prepared to give an authority which argues that its budgetary pressures mean it has to cut services even if to do so would be certain to adversely affect the welfare of children. At the very least, authorities will be required by the Courts under this duty to undertake a similar balancing exercise to that required under the equality duties, rather than simply applying an arbitrary cut to services to vulnerable children.

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53 *Statutory Guidance on Making Arrangements to Safeguard and Promote the Welfare of Children under Section 11 of the Children Act 2004*, DfES, 2007

69. A recent example of a general duty to have regard to children's welfare being afforded significant weight by the Court can be found in *R (TS) v Secretary of State for the Home Department*[54]. In *TS*, Mr Justice Wyn Williams quashed a decision by the Home Secretary to deport an age-disputed Afghan national who claimed to be 16 and had been treated by a child by the local authority, Northamptonshire. The Home Secretary wanted to remove TS to Belgium, where he had first claimed asylum. However, his social worker had produced cogent evidence to show that removal to Belgium would be seriously detrimental to TS's health and welfare. The ground on which the Claimant's challenge succeeded was in relation to s 55 of the Borders, Citizenship and Immigration Act 2009, which imposes an identical duty on the Home Secretary as is imposed on local authorities by s 11 CA 2004. At [24], Wyn Williams J stated that the duty required the decision maker to 'embark upon a sufficient and proper decision making process so as to discharge the duty with an open mind… The question…is whether the decision maker has in substance had regard to the matter identified'. The failure by UKBA to have regard to the duty was sufficient to mean that the decision to remove TS to Belgium was quashed. There is no reason to think that the Courts would take a different approach to the equivalent duty on local authorities under s 11 CA 2004, and in at least one case (*R (B) v Barnet LBC*, as above), the duty has already been held to have been breached in relation to a disabled child.

Conclusion

70. It is hoped that this paper has demonstrated the central role of the law in protecting and preserving a decent level of services and support for disabled children. Although of course the law does not specify that certain services can be cut while others cannot, what public bodies must do is ensure that cuts to services do not prevent them from complying with their statutory duties to individual children and families. Public bodies must also make sure that they comply with their general consultation and equality duties in reaching key decisions on the future of disabled children's services in their area.

71. What the above examples demonstrate is that many of the services that disabled children and their families most value are indeed 'cemented to the floor by the law'. That 'cement' may take the stronger form of individual duties under domestic or Convention law, or the somewhat weaker but still important form of obligations to consult and have regard to equality duties before

54 [2010] EWHC 2612 (Admin).

important service decisions are taken.

72. Despite the coming financial cuts, the core obligation on public agencies still remains, in the language of Para 6, Schedule 2 CA 1989, to help disabled children and their families lead lives which are 'as normal as possible'. To put this into 21st century language, this entails helping disabled children and their families realise their right to 'ordinary lives'. Public bodies which configure their cuts programme with this obligation in mind are likely to comply with the law. Public bodies which neglect this requirement are likely to find themselves reminded of their obligations by the Courts.

73. Legal action should not be the first step taken to defend services for disabled children, but where negotiation and persuasion have failed in a context where funding cuts are seen as inevitable, recourse to the law may be the only way to ensure a decent standard of support is maintained for disabled children and their families. It is therefore fortunate that the legal framework protecting disabled children's rights is relatively robust – and is likely to remain so, as it will take a very brave government indeed to legislate to reduce the legal entitlements of this particular group of vulnerable children. Public bodies which wish to ensure their limited resources are spent on services not legal challenges must respect their legal obligations in making the difficult decisions that they face as the funding available to them shrinks.

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November 2010

Please note: All views expressed in this paper are those of the author and do not necessarily represent the views of the Council for Disabled Children.

55 Steve can be contacted at s.broach@doughtystreet.co.uk and is particularly keen to be made aware of any new cases in relation to disabled children and their families, including those which settle before final hearing.