

Using the Law to Fight the Cuts to Disabled Children's Services

A practical guide for campaigners - parents, carers and local groups

Introduction

This paper is intended to help campaigners – including parents and carers - understand how the law can be used to help fight cuts to valued services for disabled children in their area. Although the focus is on disabled children's services, many of the legal principles set out in this paper will apply to services for disabled adults and other groups. The paper is intended to be read by those who do not have a legal background. However, any family or local group who are considering legal action in relation to actual or proposed cuts to services should not rely only on this paper but should seek specialist advice, including legal advice.

This paper has been written by Steve Broach. Steve is a barrister at Doughty Street Chambers specialising in cases involving disabled children and others who need care and support from public bodies. Before becoming a barrister Steve worked for a number of organisations in the voluntary sector supporting disabled children and adults and their families and was most recently Campaign Manager of the Every Disabled Child Matters campaign.

This paper has been written now because of the deep concern felt that many decisions are currently being taken to cut services for disabled children and families without proper consideration of what the law requires. These include high-level budget-setting decisions which reduce the amount of money available to fund support to families and children, decisions to reduce eligibility or otherwise restrict access to services and decisions taken to reduce individual children's care packages. All of these decisions must be taken lawfully – and the courts may intervene if public bodies neglect their legal duties when reaching these decisions.

Two recent publications by the Council for Disabled Children (CDC) go into more detail about the law that relates to families with disabled children:

1. 'Disabled Children: A Legal Handbook' ('the Handbook'), written by Steve Broach, Luke Clements and Janet Read and published by Legal Action Group and CDC in October 2010. Hard copies of the Handbook can be ordered from the Legal Action Group website (www.lag.org.uk), priced at £40.¹ The key chapters can be downloaded

¹ A further Legal Action Group book, 'Children in Need: Local Authority Support for Children and Families', will be published in April 2011. This will provide more detailed information about the legal duties on local authority children's services departments to support disabled children and other children 'in need'.

free of charge from the CDC website (www.ncb.org.uk/CDC)

2. 'Cemented to the Floor by the Law'², a paper by Steve Broach which gives more detailed coverage of the legal duties that may be used to fight cuts to disabled children's services. Available to download free of charge at:

http://www.ncb.org.uk/cdc/resources/cemented_to_the_floor_by_law.aspx

Parents and local groups are welcome to re-use extracts from this paper and are free to copy it and send it round by email. If extracts of the paper are used in other publications please state that the content was taken from this paper.

Campaigners – including parents and carers - may also wish to refer to the Every Disabled Child Matters guide to local campaigning, 'Making Disabled Children Matter Locally 2010', available to download free of charge at:

<http://www.ncb.org.uk/edcm/MDCML2010.pdf>

What do we mean by 'the law'?

Before understanding how the law might help protect the services that disabled children and their families need, we need to be clear what we mean by 'the law'. In short, 'the law' is the rules governing what individuals and public bodies can or must do. Everyone, including government Ministers and local councils, must act according to the law.³ The law in relation to disabled children comes from a wide range of sources – including Acts of Parliament, rules and regulations made by Ministers and international treaties like the UN Convention on the Rights of the Child (UN CRC). Importantly, because of the Human Rights Act 1998, all the rights found in the European Convention on Human Rights (ECHR) are now part of English law. This means, for example, that disabled children have a right to have their 'private life' and 'family life' respected by the state – including if necessary a right to be actively supported to make sure these rights are realised.⁴

As well as legislation⁵ and international treaties, 'the law' is also found in statutory guidance. Guidance is 'statutory' if it is issued by a Minister who is permitted or required to issue the guidance by legislation. Statutory guidance has whatever force the legislation behind it says

² 'Cemented to the Floor by the Law' 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. Some of the material in the current paper also comes from 'Defending services for disabled children'. CDC and the author are grateful to Legal Action Group for permission to re-produce extracts from this paper.

³ This is what is meant by 'the Rule of Law', a centrally important constitutional concept. This matters because all too often when public bodies ignore their legal obligations to disabled children and their families this is treated as a minor breach of the rules, whereas actually it undermines the rule of law and is unconstitutional.

⁴ These are the rights protected by Article 8 ECHR, see below.

⁵ Acts of Parliament are 'primary' legislation. Rules and regulations made by Ministers are 'secondary' legislation. Acts of Parliament are divided into 'sections' – so for example Children Act 1989 s 17 is 'section 17' – the duty to assess and provide services to children 'in need', including disabled children.

that it has – but generally public bodies⁶ will have a duty to do whatever statutory guidance says they must do, unless they have a good reason not to do so.⁷ Simply not having enough money to do what the guidance requires is unlikely to be a ‘good reason’ to depart from it.

No matter which of these sources the law comes from, a key question is whether a public body has a ‘duty’ or a ‘power’ to provide the service which a family are seeking. Generally, there will be a duty where the law uses mandatory words such as ‘must’ and ‘shall’. On the other hand, if the word ‘may’ is used, the public body will have a power to do whatever the law is describing. Put simply, a public body with a power can do something, a public body with a duty *must* do something.⁸ However, even if there is only a power to do something, the public body must still consider properly whether the facts of an individual case require it to take the action requested and must take that decision rationally, reasonably and fairly.⁹

The powers and duties that matter most in relation to disabled children and their families are discussed throughout this paper. Where there is a duty to do something or where a local authority have decided to exercise a power, a family can meaningfully say that they have a ‘right’ to the service – because the provision of the service will be required by the courts, as set out below.

How is the law enforced?

There is not much point focussing on the law in relation to disabled children unless there is a way for families to enforce their rights under the law. Fortunately, it is and will remain possible for families to enforce their rights in court in most areas affecting disabled children, including if unlawful decisions have been taken to cut services.

Judicial Review

The main way in which families can enforce their rights is through an application for ‘judicial review’ in the High Court¹⁰. ‘Judicial review’ is, as the name suggests, the process whereby the High Court reviews whether a public body has acted properly under the law. If a public body

6 This paper uses the term ‘public body’ to mean any organisation which has legal duties and powers which may affect disabled children. The most important of these will generally be local authorities (councils) and, at least for now, Primary Care Trusts (PCTs) – although PCTs are set to be abolished by the coalition government and replaced with GP consortia, see the Health and Social Care Bill 2011.

7 The key legal judgment on the duty to follow statutory guidance is *R v Islington LBC ex p Rixon* (1998) 1 CCLR 119 at 123 J-K. 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 (for recent cases) the ‘neutral citation’ – numbers and letters provided in the footnote reference starting ‘EWHC’ (High Court), ‘EWCA’ (Court of Appeal), ‘UKHL’ (House of Lords) and ‘UKSC’ (Supreme Court, which has replaced the House of Lords). Any other references after a case name are to a law report which can be found in legal libraries. References to ‘CCLR’ are to the Community Care Law Reports and references to ‘ELR’ are to the Education Law Reports.

8 ‘Powers need not be exercised but duties must be complied with’; See speech of Lord Nicholls in *R (G) v Barnet LBC* [2003] UKHL 57; [2004] 2 AC 208.

9 These are some of the basic principles of ‘public law’ which govern all decisions made by public bodies, including those taken in relation to disabled children and their families.

10 The High Court is one of the three ‘senior courts’ of England and Wales. No court which is lower than the High Court, for instance a Magistrate’s Court or County Court, has the power to hear an application for judicial review. Appeals from the High Court go to the Court of Appeal and then finally (in the most important cases) to the Supreme Court, which has replaced the House of Lords as the highest court in the land. Cases where there is an alleged breach of a right protected by the ECHR can also be heard by the European Court of Human Rights in Strasbourg, but only once the domestic courts have finally dismissed the case.

has failed to do what the law requires, for example has failed to assess a disabled child's need for short breaks, the Judge can make an order requiring the body to act lawfully. Any failure to act in accordance with this order would be contempt of court and would have serious consequences for the public body and its senior staff. In the vast majority of cases public bodies will do what they are ordered to do by the High Court – or may even agree to follow the guidance of the Judge so that an order is not required. Frequently public bodies reach an agreement with children and families to take the necessary steps before the case is even heard in court. Families need specialist legal advice before starting any application for judicial review – see section headed 'how can families get legal advice and representation?' below.

In every case, including cases about actual or potential cuts to services, a formal 'letter before action' should be sent by solicitors to the public body inviting them to do whatever is needed before legal proceedings are issued.¹¹ The standard amount of time a public body should be given to respond is 14 days but if the case is very urgent this can be 'abridged' (shortened) to 7 days or even a shorter time if the situation is extremely urgent. Cases involving cuts to services may be very urgent, for example if a decision has been taken to close a particular service and there is no alternative provision in place so that children will miss out on support they need. However it is much better for the court proceedings to be issued as soon as possible once it becomes clear they are needed, if the public body concerned has failed to do as requested by the letter before action. Issuing proceedings promptly means the court is not required to suddenly deal with an issue in a very limited period of time, unless the urgency of the situation demands it. This is one of the reasons why it is important to challenge consultations (if families feel they are unfair) rather than to wait for final decisions to be taken. It is also essential that if at all possible judicial review proceedings are issued within three months of the decision being challenged, as this is the time limit – and time will only be extended at the court's discretion.

In general terms applications for judicial review can only be brought where the problem is serious and at least relatively urgent. For less urgent and / or less important matters, families should instead make a formal complaint, if necessary to the relevant Ombudsman once the local authority complaints process has been exhausted.¹² However if the issue is an actual or proposed cut to a service which is important to a number of disabled children and their families then the High Court is likely to hear the case and make any orders it decides are needed.

If a case is urgent and important enough for judicial review, the next issue is funding. Families will need 'legal aid' to bring a judicial review challenge, as the costs of losing a case in the High Court will run to tens of thousands of pounds – but families who have legal aid will almost certainly not have to pay anything if they lose.¹³ Fortunately, legal aid for judicial review challenges involving disabled children is more widely available than in other areas, because it is generally the financial means of the child not the parent that are taken into account. So unless the child has significant money in his or her own name (for example a trust fund) it is likely

11 This is specifically required by the 'Pre-Action Protocol' which governs judicial review. Failure to comply with the Pre-Action Protocol is likely to mean that the High Court will refuse to hear the case, no matter how strong its merits.

12 The Local Government Ombudsman (LGO) for councils; the Parliamentary and Health Service Ombudsman (PHSO) for PCTs. Details of how to make a complaint are on the relevant websites; <http://www.lgo.org.uk/making-a-complaint> (LGO) and <http://www.ombudsman.org.uk/make-a-complaint/how-to-complain> (PHSO).

13 If parents of a disabled child have substantial means and act as the child's 'litigation friend' (a role which is necessary for a child to bring proceedings) then there is a risk, albeit very slight, that the court may award costs against the parents if the claim fails – even if the child has legal aid. Families concerned about this should seek guidance from their solicitors.

that legal aid will be available.¹⁴ It is important to note however that unless parents are eligible in their own right there may be initial costs which will need to be discussed with solicitors.¹⁵

How can families get legal advice and representation?

Families who are concerned that their children's legal rights are not being respected in decisions being taken about cuts to services need to seek specialist advice as soon as possible. Advice in relation to individual cases can come from a number of sources, including Parent Partnership Services, helplines like those run by Contact a Family, the National Autistic Society, Mencap, Scope or Carers UK or advice organisations like ACE (Advisory Centre for Education) or IPSEA. General advice centres like Citizens Advice Bureau may also be able to help – but families may find that advisors do not have the specialist expertise in disabled children's issues that they need. In relation to legal challenges to wider decisions local disability advice and advocacy organisations such as those in the DIAL network, centres for independent living, carers' centres and parent-carer groups may be able to offer advice.

However if a group of families or a local organisation is seriously considering a challenge to a consultation or a decision to cut services, specialist legal advice will be required – at the earliest possible time.

There are a number of firms of solicitors who specialise in helping families with disabled children (amongst other groups). These solicitors will have contracts to provide advice and representation through the Legal Aid scheme. This means that their services to some families will be provided free of charge, particularly in areas other than education.¹⁶ Families should be sure to check up front what the funding arrangements are with any solicitor. It is essential that families and local groups should ask up-front what costs may be and when they will need to be paid. It is also essential to check that the solicitor is experienced in the relevant area – families should not feel embarrassed to ask this essential question.

At the end of this paper is a list of solicitors who are known to specialise in work relating to disabled children and their families and are interested in helping with cases involving cuts to services.¹⁷ The Community Legal Service Website has a 'find a solicitor' option and allows search by name, category, geographical area, postcode etc.¹⁸ Relevant categories to search will include 'Public Law', 'Education' and 'Community Care'.

14 Importantly, 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). Education Tribunal appeals are discussed below.

15 This is because even if a disabled child may be eligible for legal aid it may still be their parents means who are assessed under 'Legal Help' for the initial advice stage.

16 For most education cases it will be the financial means of the parents which are assessed, not the child, meaning many more families will be ineligible for legal aid. However, this is not the case for (i) challenges to failures to implement a statement or (ii) challenges to breaches of the duty to provide suitable education for children who are out of school. In both these important areas funding can be obtained in the child's name – although see footnote 15 above in relation to problems with accessing funding for initial advice under 'Legal Help'.

17 Any solicitor who wishes to be included on this list for future versions of this paper should email s.broach@doughtystreet.co.uk with details of their firm and their experience in cases relating to disabled children.

18 <http://www.communitylegaladvice.org.uk/en/directory/directorysearch.jsp>

So what legal rights do individual children and families have?

The short answer is – more than many would think, and more than many public bodies realise. The following is a short summary of some of the key legal rights for children and families that may affect decisions to cut services:

- 1. A right to participation.** Disabled children always have a right to properly participate in decisions made about them. This right is found in international treaties¹⁹ and also very often in legislation²⁰. The High Court has stated that even if a disabled child has very severe communication impairments it is still necessary to take every possible step to find out what the child wants and if possible to act in accordance with those wishes and feelings.²¹ This means that any decision by a public body which will or may result in a reduction in services to one or more disabled children must involve that child or children in this decision and pay proper regard to their views. Similarly, a lawful decision to cut a service will need to show proper consideration to the wishes, feelings and views of all those close to the child, including as appropriate parents, siblings, grandparents, extended family and close friends. See below for the right to have decisions taken in children's 'best interests', which includes respect for their wishes and feelings.
- 2. A right to be assessed.** Many families understandably feel that they and their children are 'over-assessed' – but assessment is at the heart of the duty to support children and families. At its most basic, assessments are required for a public body to decide whether it is necessary to take a certain step to support a child or family, which is usually the test for whether there is a duty to take that step. There are also very important specific assessment duties in relation to statements of special educational needs²² and children's services.²³ Importantly, the law is clear that services should not be withdrawn from disabled people (children and adults) who are receiving them without a full re-assessment of their needs.²⁴ This is true even if the cuts are happening because 'eligibility criteria' are changing – as it will be necessary to determine whether the child meets the new criteria following a full and up-to-date assessment.
- 3. A right to services to meet their assessed needs.** Once an assessment has been completed, the public body must then decide whether it has to take the next step – for instance to provide a short break, or to make and maintain a statement of special

19 Article 8 ECHR; Article 12 UN CRC.

20 For example Children Act 1989 s 17(4A), which requires due regard to the wishes and feelings of disabled children before any decision is taken about services to be provided for them under the Children Act 1989.

21 *R (CD) v Anglesey CC* [2004] EWHC 1635 (Admin).

22 Education Act 1996 s 323 – a local authority must carry out a 'statutory assessment' if it is more likely than not to be necessary for the child to have a statement – in other words the child's needs are such that it is likely that additional support will be required from the local authority. A refusal by a local authority to carry out a statutory assessment can be appealed to the Tribunal – with most such appeals being conceded by the local authority without a hearing. This is a shameful waste of public money but means that most disabled children with significant special educational needs will ultimately get a statutory assessment, if their parents are prepared to fight hard enough.

23 Children Act 1989 s 17 and Paras 1 and 3 of Schedule 2. These assessments must comply with the statutory guidance entitled '*Framework for the Assessment of Children in Need and their Families*', published by the Department of Health in 2000 ('the Assessment Framework'). This guidance states that 'initial assessments' must be completed within 7 working days and 'core assessments' (involving more than one agency, often health) must be completed within 35 working days. Any failure to comply with what the Assessment Framework says must happen can be remedied by the High Court with a local authority ordered to carry out its duties according to the guidance.

24 This principle has been established in a number of cases, most notably *R v Gloucestershire CC ex p Mahfood* (1997) 1 CCLR 7.

educational needs. For each of these decisions there is a legal test that must be applied before deciding whether the next step should be taken. For example:

In education, if a statutory assessment shows that a child has significant needs which cannot be met by the school alone, then the local authority must issue a statement²⁵ and the child then has a right to the educational provision set out in the statement.²⁶ This right is absolute; it does not matter whether the local authority has spent its education budget or if there is a shortage of staff, the authority simply has to arrange the provision.

In relation to children's services (for example short breaks), there will be a right to the service if the local authority thinks that it is necessary to meet a child's needs²⁷ or to secure his or her well-being²⁸. If this threshold is crossed, the duty on the authority is to put in place a 'realistic plan of action (including services to be provided)'²⁹ to show how the child's needs will be met. Local authorities are allowed to use 'eligibility criteria' to help them decide which children are eligible for services, but once a child is eligible he or she must get all the support the authority has assessed them as needing. Also, eligibility criteria must not:

- Be used in place of an assessment – they can only be used to decide if a child is eligible for services after an assessment³⁰;
- Impose a fixed cap or maximum amount of support a child can receive once found eligible; and / or
- Limit the amount of support an individual child receives to less than is sufficient to meet their assessed needs³¹.

In relation to health, although the law is less clear than for children's services, there will almost certainly be a duty for PCTs to ensure that assessed health needs of disabled children are met unless these needs are minor or trivial. It is likely that the High Court will be asked to clarify the law in this area sooner rather than later. What is certain however is that PCTs have important duties to co-operate with local authorities to safeguard and promote children's well-being.³² This means that PCTs and local authorities must work together to ensure the needs of disabled children are met with a sufficient and adequate package of services.

25 Education Act 1996 s 324.

26 The duty to arrange the educational provision set out in Part 3 of a statement comes from Education Act 1996 s 324(5)(a)(i). In an important recent case, *R (N) v North Tyneside Borough Council* [2010] EWCA Civ 135, the Court of Appeal said that there is 'no best endeavours defence' to a challenge that a local authority is failing to arrange the provision specified in a statement – in other words that the local authority cannot say 'we are trying our best', it simply has to do whatever the statement says and will be ordered to do so by the Court if it does not.

27 Chronically Sick and Disabled Persons Act (CSDPA) 1970 s 2. Assessments of children under the CSDPA 1970 should be carried out as part of a Children Act assessment; see Children Act 1989 Schedule 2, Para 3 and *R (MS) v Oldham BC* [2010] EWHC 802 (Admin) at [10]. This means that authorities should make their service provision decision under both the CSDPA 1970 and the Children Act 1989 following a single assessment.

28 Children Act 1989 s 17 read with 'Framework for the Assessment of Children in Need and their Families', para 4.1.

29 'Framework for the Assessment of Children in Need and their Families', para 4.1.

30 *R (JL) v Islington LBC* [2009] EWHC 458 (Admin).

31 What eligibility criteria can lawfully do is limit the number of children eligible for support, for example saying only those children with a certain level of need get support. Once a child crosses that threshold however they are entitled to all the support they have been assessed as needing.

32 NHS Act 2006 s 82; Children Act 2004 ss 10-11.

4. A right not to have services taken away. Generally, and as noted above, the only way in which a public body can lawfully stop providing a service to a child and family is if a re-assessment is carried out which shows that the child or family's needs have lessened or gone away. The only other way in which a public body may be able to withdraw services to an individual child or family lawfully is if it has raised its eligibility criteria so the child is no longer eligible³³ – but even then there should generally be a re-assessment and a range of other legal issues will need to be taken into account before services can lawfully be withdrawn.³⁴

General legal duties that may help fight cuts

So far this paper has focused on the key legal duties in relation to individual children. However, in a time of massive cuts to services it is important for parents to understand how the law can help families to work together to protect services. Again, any families who are thinking about collective legal action should consult a specialist solicitor as soon as possible. There are five key duties that can assist:

- The duty to ensure that children's best interests are a 'primary consideration' in decisions affecting them;
- The duty, if consulting on a proposed change to a service, to do it properly;
- The duty to respect children's human rights, particularly their right to family and private life;
- The general disability equality duty³⁵; and
- The duty to have regard to the need to safeguard and promote the welfare of children³⁶.

'Best Interests'

One of the central obligations under the UN Convention on the Rights of the Child is that in decisions affecting children their best interests³⁷ should be a 'primary consideration'.³⁸ This requirement has very recently been considered by the Supreme Court in *ZH (Tanzania)*, a case involving the potential deportation of a mother to Tanzania when her children were British citizens.³⁹ Baroness Hale stated that while all other considerations could outweigh a child's best

33 In adult care this would mean the authority raising its criteria from (for example) 'moderate' to 'substantial', so that only individuals with more serious needs are eligible. These bands come from the Fair Access to Care Services guidance for adult services and are now repeated in the updated guidance known as 'Prioritising Need'. There is no equivalent to this guidance for children's services – but it is likely that children's services would be allowed by the courts to take a similar approach.

34 For example, whether the withdrawal of services is 'proportionate' under Article 8 ECHR (meaning amongst other things that it strikes a 'fair balance' between the interests of the child and the need to spend public money fairly) and whether there has been due regard to the need to promote equality of opportunity between disabled children and others (Disability Discrimination Act 1995 s 49A, to be replaced from 1st April 2011 by Equality Act 2010 s 149).

35 Now in Disability Discrimination Act 1995 section 49A, but from April 1st 2011 under Equality Act 2010 s 149; and

36 Children Act 2004 s 11

37 'Best interests' broadly means the well-being of a child; *ZH (Tanzania)* [2011] UKSC 4, speech of Baroness Hale at [29].

38 UN CRC Article 3

39 [2011] UKSC 4

interests, 'the important thing...is to consider those best interests first'.⁴⁰ Baroness Hale also made clear that an important part of any assessment of a child's best interests is 'discovering the child's own views'.⁴¹ The way the duty was put by Lord Kerr was as follows:

*'Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.'*⁴²

In the context of cuts to disabled children's services, the 'best interests' duty requires the wishes and feelings of children and the impact of the decision upon them to have been the first consideration in the minds of the decision-makers. Any decision to cut services without children's best interests being a primary consideration is therefore potentially unlawful, for example under Article 8 ECHR or section 11 of the Children Act 2004 (see below for both these duties). The requirement to act in children's best interests could be enforced in the courts by the child, their parent or another person close to the child.

Consultation

The first and most important point to understand on consultation is that whether or not there is a duty to consult, once a public body decides to consult it has to do so properly.⁴³ In other words, whether consultation is a duty or a choice, once launched the standard and quality of the consultation has to be the same.

Secondly, even if there is no specific duty to consult on a particular issue, parent's forums and other local groups may well have a 'legitimate expectation' that there will be consultation about changes to services that affect their families. If any local group becomes aware of a significant change to services which has taken place in their area without consultation they may wish to take legal advice as quickly as possible. See the recent *Building Schools for the Future* case⁴⁴ for a failure to consult at all amounting to an 'abuse of power'. This case is also important in relation to the disability equality duty, see below.

Once consultation is begun, the courts⁴⁵ have specified that four things must be in place to make it lawful:

1. Public bodies must consult in good time – so that responses to the consultation can still genuinely be taken into account before the final decision is made;
2. There must be enough information so that people responding to the consultation understand the proposals and can make an informed response;

40 Judgment at [26]

41 Judgment at [34].

42 Judgment at [46].

43 See the most important case on consultation duties, *Coughlan*; *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

44 *R (Luton BC and others) v Secretary of State for Education* [2011] EWHC 217 (Admin) at [96]

45 The consultation duties established by the High Court in *Coughlan* stem from the 'common law', that is the body of English law which emerges from court judgments over time and is not found in legislation. An example of a common law duty is that there is always a duty on public authorities to act fairly and treat like cases in the same way.

3. There must be enough time for responses. Whether 'enough' time has been given will be judged by the court (if the consultation is challenged) on the facts of the individual case. However a very short consultation over a school holiday period is unlikely to be 'enough' time;
4. There must be genuine consideration of the responses – not just 'lip service' paid to them.

If a particular consultation does not match up to these requirements, any family potentially affected by the proposed changes can bring an application for judicial review in the High Court to challenge the consultation. If the court agrees that the consultation is unlawful then the court will 'quash' the consultation and in effect make the public body start again – and do it properly the next time. Doing it properly may involve considering whether other potentially less detrimental alternatives are available – for example, increasing council tax for everyone rather than removing services from vulnerable groups.

The consultation duties are therefore very important, but may only delay the inevitable – because a public body which wants to cut disabled children's services can still reach this decision after a proper consultation. The next three duties (human rights, disability equality and safeguarding and promoting children's welfare) might provide a longer-term solution to the problem of challenging cuts to services.

Human Rights

Disabled children have a wide range of human rights which are protected by domestic and international law.⁴⁶ The most important of these in the context of cuts to services is the right to respect for private and family life under Article 8 ECHR. Article 8 requires respect for two distinct but linked rights, the right to family life and the right to private life. The right to family life is simpler to understand (respect for all types of families is required), but the right to private life is particularly important for disabled children. Private life includes a person's ability to function socially⁴⁷ and a person's 'physical and psychological integrity'.⁴⁸ In effect, this means that disabled children have a right under Article 8 to services and support to enable their personalities to develop and for them to function socially. Public bodies must remember that the ECHR, including Article 8, is intended to guarantee rights which are 'practical and effective' not 'theoretical or illusory'.⁴⁹

Article 8 requires the state not to 'interfere' with a person's right to respect for family and private life unless that interference is 'in accordance with the law' and 'necessary in a democratic society', which means proportionate (see below). It is obviously the case that 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). For this 'interference' not to breach

⁴⁶ The rights under the European Convention on Human Rights are part of English law because of the Human Rights Act 1998; section 6 of the HRA 1998 makes it unlawful for a public body (including a court) to act incompatibly with a person's ECHR rights. Other international treaties and conventions, notably the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons With Disabilities, are also binding on the state and the rights they contain can generally be enforced in court through the ECHR, particularly Article 8.

⁴⁷ *R (Razgar) v Home Secretary* [2004] 2 AC 368, speech of Lord Bingham at [9]

⁴⁸ *Pretty v UK* (2002) 35 EHRR 1

⁴⁹ See for example *Airey v Ireland* (1979) 2 EHRR 305 at [24].

Article 8 it must therefore meet these two requirements.⁵⁰ To reiterate, any cut to a service to disabled children will breach Article 8 ECHR unless it is (i) in accordance with the law and (ii) proportionate.

For the purposes of Article 8, the 'law' includes not just legislation but (for example) statutory guidance.⁵¹ This means that a breach of (for example) the Assessment Framework is likely to result in an unlawful interference with a child's Article 8 ECHR rights. Even if all the relevant 'law' has been complied with, the final test under Article 8 ECHR is whether the decision is proportionate ('necessary in a democratic society'). The key judgment here is the speech of Lord Bingham in an immigration case, *Huang v Home Secretary*.⁵² Lord Bingham emphasised that for a decision to be proportionate it must be no more than necessary to accomplish the objective. So in the context of cuts, if other less drastic steps could be taken to achieve the necessary savings then the decision cannot be proportionate and therefore it breaches Article 8 ECHR. Further, Lord Bingham added that the 'overriding requirement' of proportionality was 'the need to balance the interests of society with those of individuals and groups'. The ultimate question is therefore whether the wider economic interest justifies the decision to withdraw or reduce services to a particular group of children and families. It should also be noted that the court will have to decide for itself if the decision is proportionate if there is a challenge made to it, not simply review whether the decision was rational and reasonable and otherwise lawful. This is important because it is much more likely that a challenge will succeed under Article 8 ECHR than would be the case if other grounds were relied on.

What about a situation where a child is not yet receiving services? There may then be a 'positive' obligation under Article 8 for a public body to show respect for the child's right to family and/or private life through providing services. Positive action may be required under Article 8 in order to 'enable family life to continue'⁵³ or to 'compensate' for restrictions experienced by disabled people.⁵⁴ 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. Any cuts which made it impossible for a public body to act in this way would be highly likely to breach Article 8 – although proving this in advance may well be difficult.

Bringing a challenge under Article 8 ECHR requires a person to be an actual or potential 'victim' of a violation of their rights.⁵⁵ This is not supposed to be a high hurdle and any child or family who are or may be directly affected by cuts would be able to bring such a case.

50 This is what is meant by Article 8 being a 'qualified' right. No-one has an 'absolute' right to respect for their private and family life but everyone has the right for such respect to be shown unless the specific requirements of Article 8 is met. Other rights under the ECHR (for instance the right to life and the right to freedom from torture and inhuman or degrading treatment under Articles 2 and 3) are 'absolute'.

51 See for example *Liberty v United Kingdom* (2009) 48 EHRR 1 at [60].

52 [2007] 2 AC 167 at [19].

53 *Anufrijeva v Southwark LBC* [2004] QB 1124, judgment of Lord Woolf at [43]

54 *Price v UK* (2002) 34 EHRR 1285, judgment of Judge Greve.

55 Human Rights Act 1998 s 7

Disability Equality Duty

The disability equality duty is a duty on public bodies to have 'due regard' to a number of specified needs, including the need to promote equality of opportunity for disabled children.⁵⁶ The duty applies to all decisions by public bodies, including those in relation to individual cases.⁵⁷ So when (for example) a local authority is deciding what level of service it should provide to an individual child it must consider the need to promote that child's equality of opportunity compared with other children.

However, perhaps an even more important aspect of the disability equality duty is that it applies when high-level decisions are taken about the nature and shape of services. In discussions about the future of disabled children's services, public bodies need to be able to show that they have had the disability equality duty in mind at all relevant times. If they cannot, it is likely that (if challenged) the High Court will quash any decision taken and require it to be taken again with due regard to the duty.

It is important to understand that the disability equality duty does not require the public body to achieve equality of opportunity for disabled children – just to think about this need when reaching its decisions. However, 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 duty – particularly if it is not proposing to do something different which should benefit disabled children and their families alongside the cuts.

An important issue is when precisely in a decision-making process must a public body have regard to the disability equality duty? The *Building Schools for the Future*⁵⁸ and *Southall Black Sisters*⁵⁹ cases show that the duty must be considered when proposals are drawn up; it is unlikely to be good enough for a public body to commit to doing a disability equality assessment after a consultation – even if before the actual decision is taken.

The disability equality duty can be enforced by any child or family potentially affected by the decision on an application for judicial review.

Safeguarding and Promoting Children's Welfare

Disabled children are, of course, children first – and so the duties in the Children Acts apply to them equally as to other children. One important duty was created by the Children Act 2004 and requires public bodies to have regard to the need to safeguard and promote the welfare of children in carrying out their functions.⁶⁰

⁵⁶ Until 1st April 2011, the duty in force is Disability Discrimination Act 1995 s 49A. From 1st April, this will be replaced by the single equality duty in Equality Act 2010 s 149. Although the Equality Act duty applies to all 'protected characteristics' (age, gender, race etc) it will be very similar to the current disability equality duty.

⁵⁷ See *R (JL) v Islington LBC*, as above, and most recently *Pieretti v Enfield* [2010] EWCA Civ 1104.

⁵⁸ *R (Luton BC and others) v Secretary of State for Education* [2011] EWHC 217 (Admin)

⁵⁹ *R (Kaur and another) v Ealing London Borough Council* [2008] EWHC 2062 (Admin). This case involved a breach of the race equality duty in relation to the withdrawal of funding to Southall Black Sisters but the principles are directly applicable to the disability equality duty.

⁶⁰ Section 11(2). A case where this duty was considered in relation to a disabled child, although not in great detail, is *R (B) v Barnet LBC* [2009] EWHC 2842 (Admin), (2009) 12 CCLR 679

The way this duty works is very similar to the disability equality duty. Public bodies are not required to actually safeguard and promote children's welfare under this duty⁶¹ but they must consider this issue when reaching their decisions. So if (for example) a local authority is proposing to close a children's centre⁶² where disabled children receive short breaks, they will need to think about not only how this will impact on disabled children's equality of opportunity but also whether it might fail to safeguard and promote their wider welfare. Again, any decision to cut or withdraw a valued service which does not see an alternative service put in place may be open to challenge under this duty – and the route to do so would be an application for judicial review. This duty is closely linked to the 'best interests' duty described above.

Conclusion

This short paper has sketched out some of the key legal rights for disabled children and their families, and then looked at some of the general duties which may prevent services being cut or withdrawn. Underpinning all of this is a requirement under domestic law⁶³ and international law⁶⁴ that disabled children and their families should be supported to live 'ordinary lives'. This is what the law requires. Working together, children, families, local groups and their lawyers and advisors have the legal tools to make this happen and ensure that even in a time of intense pressure on public finances the legal rights of disabled children and their families are respected.

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.

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Doughty Street Chambers

March 2011

61 Although they are in relation to individual children under other duties, most importantly Children Act 1989 s 17(1)

62 See also on this specific issue Apprenticeships, Skills, Children and Learning Act 2009 s 198, which requires local authorities to make arrangements for 'sufficient provision of children's centres to meet local need'. Any decision to close a children's centre without proper consideration as to how else the local need for services can be met may therefore be declared unlawful and quashed by the High Court on an application for judicial review.

63 Children Act 1989 Schedule 2, Para 6

64 Article 8 ECHR and the UN children's and disability conventions

List of solicitors known to specialise in cases involving disabled children

Firm	Solicitors	Region / Area	Tel	Email	Notes
Avon and Bristol Law Centre	Joanna Daghish, Ray Avars	Bristol, South Glouc, Bath and North East Somerset, North Somerset	0117 924 8662	jod@abl.org.uk raya@abl.org.uk	
Ben Hoare Bell LLP	Simon Garlick, Chris Miller and Adam Slawson	North East England	0191 275 2626	[firstnamesurname]@benhoarebell.co.uk e.g. simongarlick@benhoarebell.co.uk	Community Care and Public Law (not Education)
Bhatia Best	Stuart Luke, Martin Bridger, Claire Shaw and Jon Wakefield	Offices in the Midlands and clients represented throughout England and Wales	0115 950 3231	[firstname.surname]@bhatiabest.co.uk e.g. stuart.luke@bhatiabest.co.uk	Instructions welcome by phone, email or fax

Fisher Meredith LLP	Laura Hobey-Hamsher, Amara Ahmad, Caroline Jelves, John Foley, Samia Khaleeli.	Based on London but national coverage	020 7091 2700	[firstname.surname]@fishermeredith.co.uk e.g. laura.hobey-hamsher@fishermeredith.co.uk	
Goodmans Law Ltd	Ian Cohen	Based in Liverpool, cover north-west and south-west England	0151 257 6000	firt@goodmanslaw.co.uk	Open 8 am to 8pm , Monday to Friday
Irwin Mitchell	Solicitors include Yogi Amin, Alex Rook, Mat Culverhouse and Polly Sweeney	National law firm with offices in London, Sheffield, Leeds, B'ham, Manchester, Bristol and Newcastle	0870 1500 100	publiclawnewenquiries@irwinmitchell.co.uk	National law firm with expert solicitors in this field nationwide.
Just for Kids Law / Lawrence & Co	Rachel Knowles	London	020 7266 7159	rachelknowles@justforkidslaw.org	Experience in Education & Community Care work

Maxwell Gillott	Many specialist and experienced solicitors including Angela Jackman, Oliver Studdert and Dan Rosenberg	London and Lancaster offices but national coverage	0845 094 1685	office@mglaw.co.uk	
Public Law Solicitors	Karen Ashton, Anne McMurdie, Alastair Wallace and Stephen Lodge	Based in Birmingham but national coverage	0121 256 0326	[initialsurname]@publiclawsolicitors.co.uk e.g kashton@publiclawsolicitors.co.uk	
Scott-Moncrief, Harbour and Sinclair	Mitchell Woolf	Based in London but national coverage	020 7485 5588	mwoolf@scomo.com	

Please state when calling or emailing that you obtained details from this paper.

Any solicitor who wishes to be included on this list for future versions of this paper should email s.broach@doughtystreet.co.uk with details of their firm and their experience in cases relating to disabled children.

Specialist solicitors can also be identified using the search engine on the Community Legal Service website – see <http://www.communitylegaladvice.org.uk/en/directory/directorysearch.jsp>