

14 May 2024

**The Kids Aren't OK:
Education, Social
Care and Health
Under Pressure
Seminar**



Professor Alison Young



Steve Broach KC



Sian Davies



Anna Bicarregui



Eliza Sharron



Talks

- Law and practice: what's going wrong with EHCPs – *Anna Bicarregui*
- Education statutory duties outside the C&FA 2014 – *Steve Broach KC*
- Disabled Children's Needs Assessments – *Eliza Sharron*
- Children Act 1989 powers and duties to care leavers – *Sian Davies*
- Questions and drinks



Law and practice: what's going wrong with EHCPs

May 2024

Anna Bicarregui

39essex.com

BARRISTERS • ARBITRATORS • MEDIATORS

LONDON • MANCHESTER • SINGAPORE • KUALA LUMPUR

 **Essex**
CHAMBERS

What's going wrong?

- Strain showing – criticism of local authorities in the High Court
- Resource/need mismatch – ‘Safety valves’ and the legislation
- Increase in parents/young people seeking education otherwise than in a school/college
 - Poorly drafted plans
 - Lack of provision available
- Social care and health: not integrated, not enforceable

What's going wrong?

- Local authorities criticised in the High Court:
- “It needs to be said that the Council's litigation conduct has been unacceptable. Its repeated failures to engage with the litigation process have led to costs and court time being wasted. More importantly, the failures have caused considerable delay to the resolution of this claim and the underlying dispute. This delay has been prejudicial to H, a young person who was coming to court seeking a remedy for a prolonged and ongoing failure to provide him with educational provision to which he was legally entitled pursuant to the outcome of previous judicial proceedings (the proceedings in the Tribunal)” (*R (On the Application Of HXN) v London Borough of Redbridge* [2024] EWHC 443 (Admin))
- “The duty on a public body is to act in accordance with its statutory obligations or, if it has not done so, to make this clear. It cannot be right that the response of a public body to a judicial review claim is to say that it has "times acted with regard to" its legal obligations when, in fact, it knows that it has acted in breach of those obligations. The lack of a candid position by the Local Authority is, to say the least, unfortunate and is not consistent with its duties to the court” (*R (On the Application Of W) v Hertfordshire County Council* [2023] EWHC 3138 (Admin)).

Resource/need mismatch

- Children and Families Act 2014 – provision is based on need alone.
- Overspend has led local authorities to enter into “safety valve” agreements with the government. These lead to agreed cuts.
- In May 2024 38 councils were participating in the safety value programme. Its goals – “(i) appropriately managing demand for Education, Health and Care Plans (EHCPs), including assessment processes that are fit for purpose (ii) use of appropriate and cost-effective provision - this includes ensuring mainstream schools are equipped and encouraged to meet needs where possible, whilst maintaining high standards for all pupils” (DfE -Guidance on our intervention work with local authorities October 2022)
- How can this be resolved? Role for litigation...

Education otherwise

- Increase in children and young people requesting education otherwise than in a school or college provision?
- Test remains – school/college is inappropriate (in the broadest sense)
- These appeals in the FTT often lead to poorly drafted plans. Why? What can be done to change that? (see *London Borough of Camden v KT* [2023] UKUT 225 (AAC))
- Does there need to be revised planning so there is greater community provision?

Social care and health not integrated

- Missed opportunity in 2014 – difference between mandatory educational provision (sections F and I) and health and social care recommendations (sections G and H)
- Social care. Social care often not as engaged in the FTT. *Will R (on the Application of LS) v London Borough of Merton* [2024] EWHC 584 (Admin) make a difference?
- Health care. “The health care provision specified in the EHC Plan [...] must be agreed by the responsible commissioning body” (Reg 12(2) of the 2014 SEND Regulations).



Education outside the CFA 2014

May 2024

Steve Broach KC

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

 **Essex**
CHAMBERS

Hot Topics

- Disability Discrimination in Schools
- School Transport
- Human Rights

Disability Discrimination in Schools

- The mischief – EA 2010 schedule 17, para 5
 - Tribunal’s remedial power ‘does not include ...the payment of compensation.’
- *R (AA) v SoS for Education* [2022] EWHC 1613 (Admin) – no breach of Article 14 ECHR
 - Application to ECtHR pending
- *R (CU) v SoS for Education* [2024] EWHC 638 (Admin) – Green Paper question on this not unlawful
 - Application for permission to appeal pending
- Also – Judge Stout decisions on interface between CFA and RA duties
 - *SS v Proprietor of an Independent School* [2024] UKUT 29(AAC) and another forthcoming

School Transport

- Huge area of expenditure for LAs
- Complex statutory scheme with different duties depending on age of child / young person
- Nature and extent of the post 16 transport duty in EA 1996 s 509AA-AC contested
 - Is there a duty to provide transport to sixth form age students when ‘necessary’?
- New DfE compulsory school age guidance controversial:
 - <https://www.specialneedsjungle.com/school-transport-guidance-update-disabled-child-impacted/>
 - Does it fail to reflect case law re extent of obligation on parents to accompany children to school?

Human Rights

- Increase in A2P1 challenges
 - *R (E) v Islington LBC* [2017] EWHC 1440 (Admin)
 - *R (ZB) v Croydon LBC* [2023] EWHC 489 (Admin)
 - Award of £10k damages each for two children for a breach of A2P1 lasting 16 months
 - Is the Ombudsman compensation level the correct benchmark here?
- *Michaela* – Article 9 prayer ban case
 - Distinction between right to have and right to manifest
 - No interference because e.g. child could have gone to different school
 - If interference, justified by wider interests of school community
 - More here: <https://www.39essex.com/events/lunchtime-webinar-everything-you-need-know-about-michaela-community-school-prayer-ban>



Disabled Children's Needs Assessments

May 2024

Eliza Sharron

39essex.com

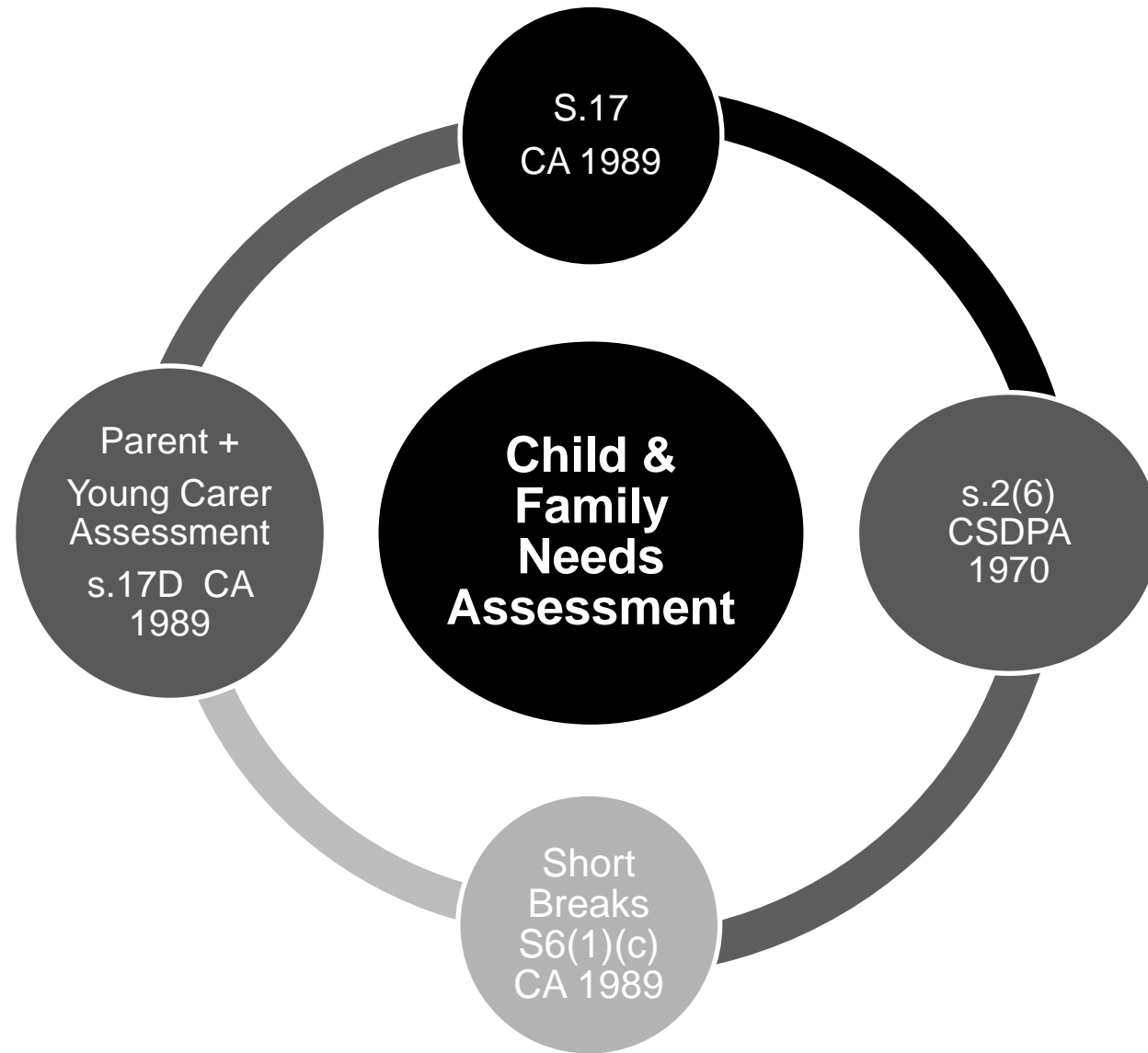
BARRISTERS • ARBITRATORS • MEDIATORS

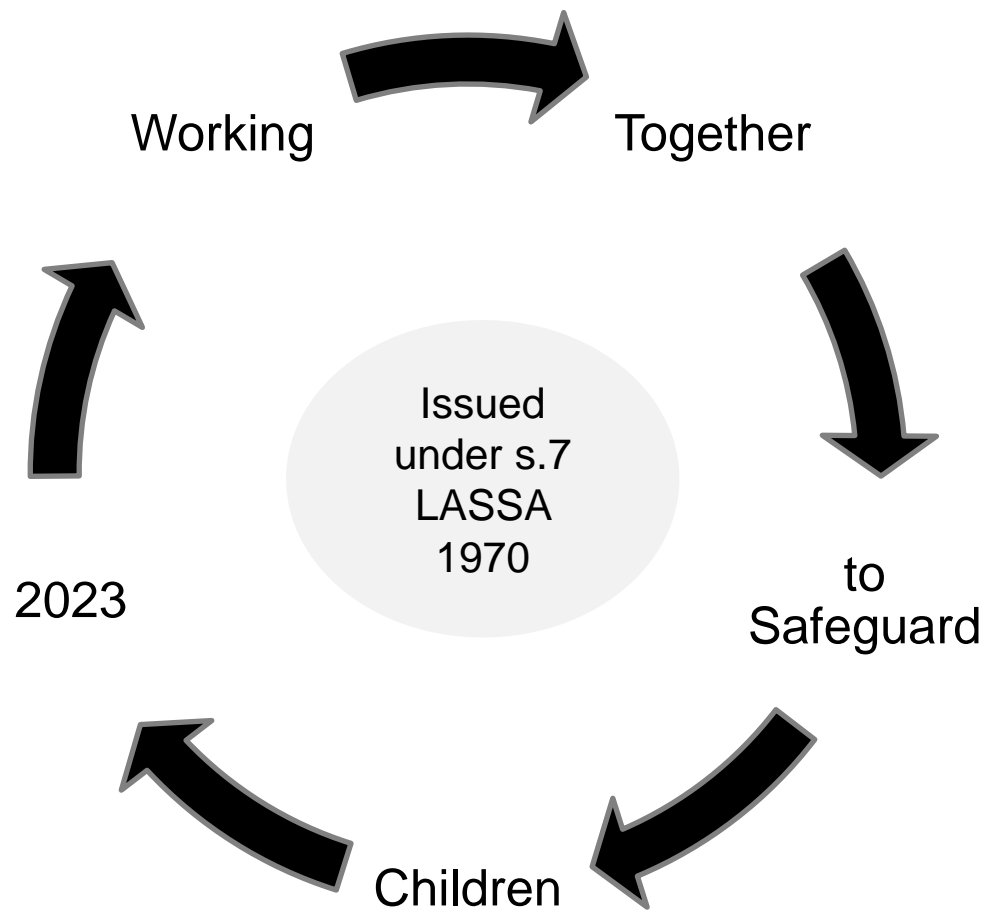
LONDON • MANCHESTER • SINGAPORE • KUALA LUMPUR

 **Essex**
CHAMBERS

Contents

- Overview
- Two recent cases
- Fixed 'direct payment' amounts
- New regulatory requirement for 16+ supported living





'this documents should be complied with unless exceptional circumstances arise' (para 6)

Two recent cases

- **TS v The London Borough of Hackney [2023] EWHC 3063**

- Needs assessment found to be unlawful as it did not follow *Working Together* Guidance
 - No clear analysis of TS's needs;
 - As a consequence – no realistic plan of action
- Irrational and unlawful service provision decision – flowing from failure to carry out a lawful assessment in accordance with *Working Together*.
- Failure to consider whether duty under s 20(1) CA 1989 trigger – i.e. the duty to accommodate.
- Interim provision (2 nights at respite provision, per week). On disposal, the court made a quashing order and mandatory order for re-assessment, recommending interim provision maintained until new plan in place.

LHG v Bury Council [2023] EWHC 3162 and LHG v Bury Council (No 2) [2023] EWHC 3235

- LHG attended Special Spirits for 7 ¾ hour per week at reduced rate of £15, which was going up to £30p/h. Awarded 4 hours support per week and 8 during holidays at £10.90.
- Failure to complete lawful assessment:
 - Errors of fact – impact on Special Spirits provision (respite)
 - No assessment of school holidays
 - No assessment of parent carer needs or impact on other children
 - Focussed solely on short breaks – no assessment of physical needs in the home
 - No clear plan re outcomes
- Granted permission re holidays and Special Spirits/Rolled up on the remaining items

Interim relief

- LA had argued that even if provision of SS was funded p/h should be a DP rate of £12.10.
- Argued that SS was not a commissioned service and that going beyond DP rate would have a ‘flood gates’ effect:
 - Granted an award to maintain Special Spirits at full cost pending determination (£30 p/h) (£240 p/w);
 - School Holidays – maintained the £240 p/w for SS (to be used flexibly) plus the additional 8 hours the LA had offered.

Fixed Direct Payments Rate

- The Department for Education *Guidance on Direct Payments For Community Care, Services for Carers and Children's Services England 2009*:
 - 113. A resource allocation system should be applied as a means of giving an approximate indication of what it may reasonably cost to meet a person's particular needs according to their individual circumstances. It is important for councils to ensure that their resource allocation process is sufficiently flexible to allow someone's individual circumstances to be taken into account when determining the amount of resources they are allocated in a personal budget.
 - 114. In estimating the reasonable cost of securing the support required, councils should include associated costs that are necessarily incurred in securing provision, without which the service could not be provided or could not lawfully be provided. The particular costs involved will vary depending on the way in which the service is secured...

Equivalent Care and Support Statutory Guidance for adults:

- 11.10 'The personal budget must always be an amount sufficient to meet the person's care and support needs, and must include the cost to the local authority of meeting the person's needs which the local authority is under a duty to meet, or has exercised its power to do so.
- 11.23 ... It is important that these factors are taken into account, and that a 'one size fits all' approach to resource allocation is not taken. If a RAS model is being used, local authorities should consider alternative approaches where the process may be more suitable to particular client groups to ensure that the personal budget is an appropriate amount to meet needs.
- 11.24 Regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency.'

New 16 + Regulatory Requirement

- 09 September 2021, by virtue of the *Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021* introduced s.27A to the *Care Planning, Placement and Case Review (England) Regulations 2010*:

- s.27A Prohibition on placing children under 16 in other arrangements

- Since October 2023 new requirement for 16+ supported accommodation to register with Ofsted and introduction of:

- s.27C prohibition on placing a child who is 16 or 17 in other arrangements

Regulation 36(3) of the Supported Accommodation (England) Regulations 2023

- Prohibition on placing a child who is 16 or 17 years old in other arrangements

- **27C.**—(1) A responsible authority may only place a child who is 16 or 17 years old in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation—

- (a) is supported accommodation, as defined in regulation 2 of the Care Standards Act 2000 (Extension of the Application of Part 2 to Supported Accommodation) (England) Regulations 2022, that is provided by a supported accommodation undertaking

- (i) in respect of which a person is registered under Part 2 of the Care Standards Act 2000, or

- (ii) where regulation 44 of the Supported Accommodation (England) Regulations 2023 applies to the person carrying on the undertaking, or

- (b) is excepted accommodation.

* **Re T (A Child)[2021] UKSC 35** - it remains an option for a court to authorise the deprivation of a child's liberty in an unregulated setting, where it would breach the child's ECHR rights not to do so.



Children Act 1989 powers and duties to care leavers

May 2024

Siân Davies

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

 **Essex**
CHAMBERS

Leaving care duties

Children Act 1989, Part III

In particular: – Sections 23C to 24C – Schedule 2 paras 19A-19C

- Care Planning, Placement and Case Review (England) Regulations 2010/959 ("Care Planning Regs 2010")
- The Care Leavers (England) Regulations 2010 ("Care Leavers Regs 2010")
- Statutory Guidance Volume 3: planning transition to adulthood for care leavers October 2010 (revised January 2015) ("the Guidance")

Duties to care leavers

- Full duty owed to a ‘former relevant child’ –
‘looked after’ for a period amounting to 13 weeks beginning after the age of 14, and finishing after 16
- More limited duty to ‘person qualifying for advice and assistance – *‘looked after’ for any length of time between age of 16 and 18*

Leaving care duties: an overview

The key elements are:

- A personal advisor
 - A pathway assessment
 - A pathway plan
 - Review of the pathway plan
-
- Can include accommodation provision if needs assessment identifies

Retrospective imposition of leaving care duties

- *M v Hammersmith and Fulham* (child accommodated under Housing Act 1996 in circumstances which gave rise to duty under CA 1989)
 - *GE(Eritrea)* (subsequently found to have been a child but was assessed as being an adult)
 - *R(AB) v LB Ealing* (JR challenging decision not to exercise discretion to treat as person owed leaving care duties)
- LA has a discretion to treat a young person who was not in fact accommodated under the CA 1989 as a person who qualifies for leaving care support

Age disputed YP

- Undocumented asylum seekers - LA or Home Office responsible for accommodating?
- Age required for purposes of s.20 and leaving care provisions, whether “a child”
- *B v Merton* [2003] EWHC 1689 criteria for age assessment - still operative post *A v Croydon*
- Age for purposes of CA 1989 is a “precedent fact” *A v Croydon LBC* [2009] UKSC 8
- Held there to be a fact-finding role for the Administrative Court (now Upper Tribunal as transferred routinely post-permission)
- Challenge is (currently) still by way of JR

Age assessment

- ADCS Guidance (non-statutory)
https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf
- Subject to consideration in *R(HAM) v Brent* [2022] EWHC 1924 (Admin) - fairness is not a checklist exercise, but requires consideration of what is fair in all the circumstances
- Accommodation in line with claimed age pending resolution of age dispute and adult accommodation unlikely to be suitable save, possibly, for a very short period/ in exceptional circumstances: *R(AB) v LB Brent* [2021] EWHC 2843

All change? Nationality and Borders Act 2022 Part 4 on age assessments

- *National Age Assessment Board* run by Home Office: LA can assess itself, or elect for NAAB social workers to do so, if the latter, is bound by the outcome
- Sections 54-57 NBA create a direct right of appeal to the *First Tier Tribunal* (Immigration and Asylum Chamber) for determination of age in respect of a disputed age assessment (not yet in force) – FTT must assign a DOB
- S.52 allows SoS to make regulations specifying *scientific methods* that may be used. S.52(2) goes into considerable detail of what these may constitute including ‘imaging technology’ and analysis of DNA derived from cells, saliva or ‘other samples’ The SoS must ‘seek scientific advice’ before deciding that a method is appropriate. Potential inference from lack of consent.

Questions...and drinks