

**IN THE MATTER OF THE DRAFT CHILDREN AND  
FAMILIES BILL**

**AND IN THE MATTER OF THE DRAFT CARE AND SUPPORT BILL**

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**OPINION**

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**INTRODUCTION**

1. We are asked to provide an opinion to the Every Disabled Child Matters ('EDCM') campaign on various matters in relation to the Children and Families Bill 2013 and the draft Care and Support Bill concerning how this proposed legislation will impact on disabled children and children with special educational needs (SEN) if enacted in its current form.
2. As Instructing Solicitors and EDCM are well aware, the Bills propose reforms to (respectively) the provisions governing education, social care and health services for disabled children and young people and those with SEN and the care services that disabled adults (over 18) will receive. Both bills contain provisions which relate to the transition from children's to adults' services.
3. Our instructions set out one general question and a series of specific questions dealing with matters relating to the draft proposals which cause concern to EDCM. We answer the general question first below before turning to the specific questions.
4. In headline terms, and as addressed in more detail in the conclusion to this opinion, we are not at all clear that the benefits of Part 3 of the Children and Families Bill outweigh the disruption and confusion that will be caused by abolishing the careful statutory scheme for SEN that has developed under the

Education Act 1996. This is particularly so given that the Bill does not in fact deliver on the widespread assumption that new legislation would lead to a right to joined up care and support for children and young people with significant additional needs.

5. In summary therefore, we consider that the proposals in the draft Bill represent a lost opportunity to establish a genuinely joined up system for disabled children and young people and those with SEN. This is likely to lead to disappointment amongst those, particularly families, whose hopes were raised by the preceding Green Paper. It is likely in our view that these proposed reforms will give rise to further complication and confusion within an already labyrinthine system, which would be detrimental to the interests of disabled children and young people and those with SEN and would fail to meet the objectives of the Green Paper. We suggest that Part 3 of the Bill should be radically revised to address the detailed concerns set out below in order to create a system worthy of the 21<sup>st</sup> century which will meet the needs of this vulnerable group of children in the round.
  
6. This opinion focuses primarily on the consequences of the Bills on health and social care services for disabled children and young people and those with SEN. As such, the welcome aspects of the Bill in relation to educational issues, for example the extension of EHC Plans to 25, the requirements for Academies to comply with the new framework and the duty to provide SEN information to young people, are not dealt with fully below.

### General Question

7. The general question which we are asked is how the Children and Families Bill would affect access to health and care services for (a) disabled children and young people aged 0-25 and (b) children and young people with SEN aged 0-25.

8. The framing of the question immediately sheds light on one of the central problems created by the Bill, which is the perpetuation of distinct but highly overlapping categories of 'SEN' and 'disability', with children's entitlements dependent on which of these categories they fall into.
  
9. Taking SEN first, the Bill at clause 20(1) effectively repeats the existing two part definition from the Education Act 1996 s 312, so that a child has SEN if he or she has a learning difficulty or disability which calls for special educational provision to be made for him. Although this is plainly a broad definition, it will continue to exclude those children with impairments, for example physical or sensory impairments, which do not impact significantly on their learning or prevent or hinder them from making use of mainstream school facilities (see clause 20(2) for this expanded definition).
  
10. Similarly, 'special educational provision' is defined in clause 21 of the draft Bill in essentially the same terms as under the Education Act 1996 s 312, in essence being provision that is additional to or otherwise different from provision made generally in schools.
  
11. However clause 21 also introduces definitions of 'health care provision' and 'social care provision'. 'Health care provision' is the provision of all forms of health care services, whether or not as part of the NHS; 'social care provision' is 'the provision made by a local authority in the exercise of its social services functions'. A caveat has been added to the Bill at clause 21(5) to the effect that provision is to be treated as special educational provision if it is health care provision or social care provision made 'wholly or mainly for the purposes of the education or training of a child or young person'. The effect of this is, we presume, to preserve the current situation which has developed through case law whereby therapies such as Speech and Language Therapy are treated as special educational provision where they are meeting a child's educational needs.

12. The primary social services functions to which the definition of 'social care provision' refers are the duty to provide a wide range of services pursuant to section 2 of the Chronically Sick and Disabled Persons Act (CSDPA) 1970 and the functions towards children 'in need' set out in Part III of the Children Act 1989.<sup>1</sup>
13. The common feature of these social services functions is that they apply to children who are 'disabled'. The primary definition of 'disability' is that contained in section 17(11) of the Children Act 1989, which states that 'a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity...'. This definition, although outdated and stemming from a 'medical model' of disability, is also very broad. As a result, very many children will meet both definitions and will both have SEN and be 'disabled'. However it is possible both that a child may have SEN and not be 'disabled' and that a child may be 'disabled' and not have SEN.
14. Although we do not have any hard data our understanding that the numbers of children and young people who have SEN but are not 'disabled' or who are 'disabled' but do not have SEN will be considerable, certainly running into tens if not hundreds of thousands. We are aware for example that research from the University of Bath suggests that 25% of disabled children would not have identified SEN.<sup>2</sup> In our view the Bill wholly fails to recognise the consequences of the imperfect overlap between these two categories of children and young people. If the Government does not know how many children and young people fall into one but outside of the other category then it cannot possibly know whether it is appropriate to proceed with reforms that are rooted in SEN to the exclusion of disability.

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<sup>1</sup> In particular, the general duty to provide services to children 'in need' under section 17 and the duties and powers in relation to accommodation for children 'in need' (which may include residential short breaks) in section 20.

<sup>2</sup> Porter and others, Disability Data Collection for Children's Services, Research Report DCSF-RR062, Universities of Bath and Bristol on behalf of the Department for Children, Schools and Families

15. Throughout the Bill, the focus of the proposed legislation is on ensuring that a child's SEN are met through the appropriate special educational provision. Although the Bill proposes relatively modest additional obligations in relation to the integration of education, health and care services, it establishes no new duties on any public bodies to actually provide health or care services to disabled children. This is, in our view, the major shortcoming in the proposed legislation.

16. To give some examples of how this problem permeates the Bill:

- a. Clause 25, which contains a new duty to 'promote integration of special educational provision with health care provision and social care provision' is only engaged where a local authority thinks that to do so would (a) promote the well-being of children or young people with SEN or (b) improve the quality of special educational provision. A local authority is not obliged to do anything under clause 25 merely because it would promote the well-being of disabled children who do not have SEN or would improve the quality of social care or health care provision.
- b. Clause 26, which requires local authorities and the new clinical commissioning groups (CCGs) to make joint arrangements to ensure that 'EHC provision' is secured, only applies in relation to children and young people who have SEN. This is particularly unhelpful given that clause 26(2) defines 'EHC' provision as including health care and social care provision as well as special educational provision. It is therefore very difficult to see why the restriction imposed by the words 'who have special educational needs' at the end of clause 26(1) is necessary. Surely the Government also intends local authorities and CCGs to co-operate to ensure that health and care provision is made for disabled children who do not have SEN?

- c. Clause 27(1) imposes a duty on local authorities to keep ‘special educational provision’ and ‘social care provision’ under review – but only for children and young people who have SEN. There is therefore no duty to keep under review social care provision made for disabled children who do not have SEN. The same criticism applies to the duty imposed by clause 27(2) to consider whether provision available is sufficient to meet needs – this only relates to the needs of children and young people who have SEN.

17. We cannot see any rational basis for the exclusion of disabled children who do not have significant SEN from the system proposed in Part 3 of the Bill. The stated purpose of the legislation is to ensure that joined up support is provided to children. Why should this joined up support only be available to children who have significant SEN, rather than children who may have limited educational needs but very profound health and/or care needs?

18. There cannot be any cost objection (at least in relation to social care), because these children are already entitled to a separate assessment and service provision process as set out below. Although there may be a cost implication in giving disabled children with significant health needs a right to have those needs met, we struggle to believe that the Government does not already expect those needs to be met notwithstanding the absence of any specific duty to do so. As such, imposing a duty to meet the health and social care needs of disabled children and those with SEN within the EHC Plan system appears to us to be resource neutral – or indeed potentially leading to cost savings if a more efficient assessment and planning system resulted.

19. Moving on from this initial criticism, we consider that the major reforms proposed in the draft Bill are as follows:

- a. Clause 30 requires the publication of a ‘local offer’ for children and young people with special educational needs. This requires publication of the education, health and social care provision that the local

authority 'expects to be available [inside and outside] its area at the time of publication'. While it is no doubt helpful to families to have better information, it does not of itself create any new entitlement to support. The local offer is considered in more detail below.

- b. Clauses 36-47 deal with the arrangements for Education, Health and Care Plans (EHC Plans). Although in form these may seem very different to the present SEN Statement, in substance and for the reasons set out in more detail below there is no meaningful legal distinction between a SEN Statement and an EHC Plan. Both result in an individual entitlement to special educational provision to be made; neither result in any entitlement to health or care services. What is however important is that the EHC Plan will run to 25 and will replace the current learning difficulty assessment conducted under section 139A of the Learning and Skills Act 2000 for young people in post-school education.
- c. Clause 43(1)(c) is important, because it specifies that Academies must admit children where they are named in an EHC plan. This is obviously a welcome development.
- d. Clause 48 provides for personal budgets in education, but makes clear that these will be an option for parents and / or young people not a requirement.<sup>3</sup> The detail of this scheme will be set out in regulations, and it is vital that the regulations also make clear that personal budgets are an option not a requirement, and that there is a clear duty for the personal budget to meet the reasonable cost of securing the necessary services to meet a young person's needs as identified in the EHC plan. Again, the personal budget provisions in the draft Bill are considered in more detail below

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<sup>3</sup> See clause 48(1); 'A local authority that maintains an EHC plan for a child or young person must prepare a personal budget for him or her if asked to do so by the child's parent or the young person' (emphasis added).

- e. Clause 49 will insert a new section 17ZA into the Children Act 1989, which will require provision being made to children 'in need' under section 17 of the 1989 Act to continue after the young person turns 18 where an EHC plan is maintained. This is potentially helpful, although could also lead to confusion as to whether children's services or adult services are responsible for meeting the care services specified in the EHC plan (aside from the fact, noted above, that there is no statutory duty to provide these care services in the draft Bill).

20. We pick up many of these issues again in response to the specific questions below.

### Specific Questions

*A: In what way would the current proposal for an EHC assessment and plan affect, change or improve current levels of integration between education, health and social care assessments for children and young people who are disabled and/or have SEN?*

21. We are not convinced that the EHC assessment process will lead to a more integrated approach to education, health and social care assessments for disabled children and young people or children and young people with SEN. Unless a local area chooses to integrate its Children Act and NHS Act assessment and planning functions into the EHC assessment process, then children with education, health and care needs will still require separate education, health and care assessments and plans.

22. Even if a local area does integrate its assessment and planning functions into the EHC assessment process, this will still leave separate processes required for the majority of children with SEN and disabled children who will not qualify for an EHC assessment or Plan. As a result we consider that it is essential that the Government clarifies that the Children Act assessment duty for



children 'in need' will continue to apply to disabled children, notwithstanding the introduction of EHC assessments.

23. In this regard we note that the letter from the Minister, Edward Timpson MP, to the Council for Disabled Children dated 5 February 2013 relies on the continued availability of Children Act assessments to justify the exclusion of disabled children without SEN from Part 3 of the Bill. Although we do not accept that it is helpful or appropriate to create a two-tier system whereby disabled children with significant SEN have an EHC Plan (albeit with no enforceable social care component) whereas other disabled children do not, it is at least to be welcomed that the Government plainly accepts (as it must unless the 1989 Act is amended) that disabled children remain children 'in need' and thereby entitled to assessments under Children Act 1989 s 17.

24. Even with such clarification we consider that significant potential for confusion in practice in this area will remain. Further, we are concerned that as presently drafted clause 36 will simply result in more delay in the completion of assessments, as health and social care assessments will need to be completed before the primary SEN aspect of the assessment can be finalised.

25. The purpose of an EHC assessment, as set out in clause 36 of the draft Bill, is to determine whether an EHC Plan should be issued with respect to the child or young person. As discussed in detail below, an EHC Plan does not provide any guarantee that health or care provision will be made. As such, any child or young person with significant health or care needs will be likely to require:

- a. A child 'in need' assessment pursuant to section 17 of the Children Act 1989 (if under 18) or a social care assessment pursuant to section 47 of the NHS and Community Care Act 1990 (if over 18 – and the equivalent provisions of the draft Care and Support Bill when it becomes law) to assess their care needs and receive appropriate social care services; and / or
- b. A health assessment, potentially under the appropriate National Framework for continuing healthcare if the child or young person's

health needs are very significant, to assess their health needs and receive appropriate health services.

26. We would make the following additional points:

- a. There is already a power for education, health and social care assessments to be completed at the same time; see Children Act 1989 Schedule 2 Para 3.<sup>4</sup> It is therefore difficult to see what, if anything, the draft legislation adds in relation to allowing 'joined up' assessments.
- b. Under clause 36(3), the duty to assess only arises where it 'may be necessary for special educational provision to be made'. As such, and to reiterate the point made generally above, the draft Bill offers no benefit at all for disabled children or young people who do not have SEN.
- c. We share the concerns expressed forcefully by IPSEA and others that far too much of the detail of the assessment process, for example the timescales for completion of the assessment will be set out in regulations which are not yet published in draft for consideration. As such even in relation to their restricted role in informing the EHC Plan decision the EHC assessments may be less advantageous for children with SEN than the current statutory assessments under the Education Act 1996.

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<sup>4</sup> 'Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under... any other enactment.'

*B. In what way would the current proposal for an EHC Plan affect, change or improve access to social care services for children and young people who are disabled and/or have SEN?*

27. We do not consider that the transition from Statements to EHC Plans is likely to make any material difference to the ability of disabled children and young people and/or those with SEN to access social care services necessary to meet their needs. The current Statements allow for the inclusion of non-educational needs and provision, and like with the EHC Plans there is no enforceable duty to provide this provision. It is therefore very difficult to see what legal benefit will accrue to children and families from the change from Statements to EHC Plans. This is plainly a missed opportunity to improve on the current unsatisfactory arrangements.

28. As mentioned above, the primary duty on local authorities to meet the needs of disabled children and young people (including those with SEN) is that contained in section 2 of the CSDPA 1970. The entitlement to support under the CSDPA for a disabled person is dependent upon a local authority accepting that it is necessary to provide services to meet the person's needs. This judgment in turn is dependent upon an assessment, which for a child must be conducted under section 17 of the Children Act 1989 and the associated statutory guidance.<sup>5</sup> Assessments for disabled adults (over 18) are carried out under section 47 of the NHS and Community Care Act 1990 and the associated directions and statutory guidance.

29. This position could have been altered under the Bill, for example by imposing an obligation on local authorities to provide the social care provision set out in an EHC Plan. However the Bill expressly restricts the duty on local authorities

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<sup>5</sup> At the moment there is detailed and prescriptive guidance on Children Act assessments contained in the *Framework for the assessment of children in need and their families*, but as EDCM will be aware the Department for Education has recently concluded its consultation on withdrawing this guidance and replacing it with far less prescriptive guidance, which (for example) removes nationally-set timescales for assessment and abolishes the distinction between 'initial' and 'core' assessments. However any change to the guidance cannot affect the basic duty to assess under the Act, which has been established since the judgment of the House of Lords in *R (G) v Barnet LBC* [2003] UKHL 57.

to provide support to the child or young person to the special educational provision set out in the plan; see clause 42. There is no provision in the Bill imposing any duty on health bodies such as CCGs to provide health services in an individual case.

30. As such, and precisely as with the present Statements, there is no duty on the local authority to provide any social care provision specified in an EHC Plan, nor is there any duty on the CCG or any other health body to provide the health provision (on which see below). Of course, a local authority or CCG may choose to make such provision – but in the absence of such a choice being made, the child’s rights will remain those under the existing statutory provisions set out above. This will in our view inevitably lead to confusion and frustration with ‘the system’ for families who will, understandably, imagine that an ‘EHC Plan’ will lead to a right to the necessary education, health and care support for their child.

31. The following clauses of the draft Bill which relate to ECH Plans could affect access to social care services for children and young people who are disabled and/or have SEN:

- a. Clause 26, which establishes the duty to make joint commissioning arrangements, could lead to there being more and more appropriate social care provision available in a particular local area. However, we note that clause 26(3)(a) only requires local areas to agree the EHC provision ‘reasonably required by the special educational needs of the children and young people concerned’. This restriction is simply nonsensical; the ‘special educational needs’ of children and young people are unlikely by themselves to require any health or care provision to be made – particularly now clause 21(5) provides that provision that would otherwise be health care or social care provision is in fact special educational provision where it is wholly or mainly

intended to support the education or training of a child or young person.

- b. Clause 28 imposes duties on local authorities and partners, including CCGs, to co-operate; however it is difficult to see what, if anything, this adds to the existing co-operation duty under section 10 of the Children Act 2004 – particularly as the 2004 Act duty is explicitly related to the need to safeguard and promote children’s welfare, whereas no purpose is given to the co-operation duty imposed by clause 28.
- c. Clause 31 requires partner agencies, including CCGs, to co-operate with local authorities in specific cases. However, the partner agency may refuse to act if to do so would ‘have an adverse effect on the exercise of its functions’; clause 31(2)(b). This would allow a CCG or another partner agency to refuse to co-operate in any particular case if, for example, to do so would result in any significant financial expenditure, as that money would then not be available to support any of its own functions. Our concerns about this very broad exemption from the co-operation duty are set out below.
- d. Clause 30 sets out the requirements for a ‘local offer’, being the publication of information about EHC and related provision in the authority’s area. We return to the ‘local offer’ under the specific question below, however it is clear that as drafted it will not entail any new entitlement to services for disabled children and young people or those with SEN.
- e. Clause 48 creates a duty on local authorities to prepare a personal budget on request for any child who is the subject of an EHC Plan and a power to make direct payments ‘to secure provision to which the budget relates’; clause 48(3)(d). However as there is already a duty under section 17A of the Children Act 1989 and its associated

regulations<sup>6</sup> to make direct payments to meet a child's eligible social care needs where certain modest minimum requirements are met, the power created by clause 48 is unlikely to affect the way in which disabled children receive social care services – its impact is likely to be limited to educational provision and we anticipate that the new provision will be effective only in a very limited number of cases.<sup>7</sup>

- f. Clause 49 will insert a new section (section 17ZA) into the Children Act 1989 to allow a local authority to continue to provide services under section 17 after the child turns 18 so long as the EHC Plan is maintained. This is potentially a helpful development, particularly as in many local areas eligibility criteria for adult services are tighter than those for children's services, and so such young people may not be eligible for adult social care support. Furthermore it will allow families to argue that where transition planning has not happened properly or at all Children Act services should continue while a proper plan for adult services is put in place.
  
- g. However it is important to note that clause 49 establishes a power, not a duty, to continue to provide Children Act services post-18; there is therefore no entitlement to this for any particular young person. Moreover there is ample evidence that the leaving care scheme inserted into the Children Act 1989 by the Children (Leaving Care) Act 2000 is routinely ignored by local authorities, with young people transitioning on from local authority care without any proper support. There is nothing to suggest in the current fiscal climate that local authorities would be any more minded to spend limited children's services funds on disabled young people under this new power than they have been to support care leavers under the relevant powers and

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<sup>6</sup> For England, the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009

<sup>7</sup> For example, in certain of the pilot areas the new SEN direct payments are not generally available if the local authority has entered into a block contract to purchase a particular service, for example speech and language therapy.

duties. Finally, this new power is of course limited to only those young people with an EHC Plan, so there is no new power to continue to provide Children Act services to the vast majority of disabled young people and those with SEN who will not have an EHC Plan maintained for them.

*C: What would be the combined impact of the current proposals for an EHC assessment and the changes to the 'Framework for the assessment of children in need' on assessment for social care services?*

32. The Bill currently does not set out the way in which the EHC assessment and Plan will dovetail with the obligation to carry out an assessment under section 17 of the Children Act 1989 and the duty to provide services post-assessment where it is necessary to do so imposed by CSDPA 1970 s 2. For the reasons set out above the EHC assessment process will not result in any entitlement to social care services and so disabled children (including those with SEN) will still require a Children Act assessment to determine eligibility for social care support and the level of care required. The fact that the EHC Plans does not appear to act as vehicle for ensuring the delivery of social care support to disabled children and those with SEN emphasises the importance of the existing *Framework for the assessment of children in need* (2000) for disabled children and why, in our view, this guidance plainly needs to be left in force.

33. There is no reason we can see why a forward-thinking local authority could not choose to incorporate its Children Act assessment process into the EHC assessment process, and then choose to accept that any care provision specified in the EHC Plan must then be provided pursuant to its CSDPA 1970 s 2 duty. However, there is nothing to require a local authority to take such a joined up approach, and moreover this approach would only work for those children eligible for an EHC Plan in the first place – being those with significant SEN. The local authority would therefore certainly need to retain a stand-alone Children Act assessment process for those disabled children who did not have significant SEN. It appears to us that a local authority would only

be able to avoid carrying out a separate child 'in need' assessment for those children with significant SEN who are the subject of EHC Plans if in practice the ECH assessment had led to a detailed understanding of the child's care needs and the EHC Plan constituted a proper plan to meet those needs with services actually being provided.<sup>8</sup> In our view this would create additional bureaucracy which would undermine the Government's intention to simplify the system.

34. In relation to Children Act assessments, the Department for Education (DfE) has recently finished consulting on replacing the existing statutory guidance on Children Act assessments, the *Framework for the assessment of children in need and their families*, with much looser and less prescriptive new guidance. The impact this would have on disabled children includes:

- a. There would no longer be any distinction between 'initial' and 'core' assessments. This may mean both that children have to wait longer before their needs are assessed (if no initial assessment is done) and that the final assessment (if not as detailed as a core assessment) does not comprehensively analyse and evaluate the child's needs in the family context.
- b. There will no longer be any set timescales for assessments to be completed. We are already aware that in a number of the authorities which are trialling the new proposed approaches this is leading to significant delay in the completion of assessments.

35. We are firmly of the view that such a change in the statutory guidance would be wholly detrimental to the interests of disabled children and those with SEN who require social care support (many of whom will of course also be 'disabled'). We note however that although the DfE expressed an intention to introduce the new guidance in December 2012, at the time of drafting this opinion no announcement has been made. We hope that in the light of

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<sup>8</sup> Thus addressing all the relevant facets of the child's life (including family and environmental factors) and meeting the requirements of paragraph 4.1 of the *Framework for the assessment of children in need*, including for a 'realistic plan of action'.



responses to the consultation the DfE will reconsider its position in this regard and will not proceed with the proposals.

*D. What would be the combined impact of the current proposals for an EHC single assessment and the proposed changes to social care services for young people who are disabled and/or have SEN under the draft Care and Support Bill?*

36. The draft Care and Support Bill will reform the statutory scheme for adult social care. It will apply solely to those over 18, so the period of overlap here will be 18-25, where young people will remain the subject of an EHC Plan.

37. The fundamental problem in relation to EHC Plans for 18-25s is the same as in relation to children; there is no duty to provide any care or health provision set out in the Plan, only the special educational provision. As such, disabled young people and those with SEN will need to be assessed for social care support under the draft Care and Support Bill provisions – unless (as noted above) the local authority chooses to exercise its new power to provide Children Act services to over-18s while an EHC Plan continues to be maintained. There will be even greater confusion for families here, because the EHC Plan may specify services which are then in fact provided while the child is under 18, but which may then be withdrawn when adult eligibility criteria are applied post-18 – although the EHC Plan remains in force without amendment and the young person's needs have not changed.<sup>9</sup>

38. The draft Care and Support Bill has, as we understand it, been broadly welcomed by the disability sector. It will codify the disparate and confusing adult social care scheme we have presently into a single Act with associated regulations and a new Code of Practice. Important reforms proposed by the Bill include:

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<sup>9</sup> For such a decision to be lawful a further assessment under section 47 of the NHS and Community Care Act 1990 would need to be carried out, but sadly in our experience local authorities routinely decide to reduce care packages without completing any further assessment, simply by applying their adult eligibility criteria to the facts of the case as they see them.

- a. New statutory principles which establish that the promotion of individual well-being is the primary purpose of adult social care services (clause 1);
- b. Clearer entitlements to support post-assessment (clauses 17-22), including for the first time a clear statutory duty to provide support to meet carers' eligible needs (clause 19). However the new rights apply only to carers of disabled adults, on which see below;
- c. Nationally set eligibility criteria, which will help reduce the existing 'postcode lottery' whereby eligibility for care is presently highly dependent on geographical location (clause 13);
- d. Important new 'portability' rights, to help disabled adults move from one location to another and retain their support (clauses 31-33); and
- e. A new statutory framework for safeguarding vulnerable adults (clauses 34-38).

39. However, these proposals taken together do not radically alter the current approach to adult social care, or indeed children's social care. In essence, the scheme will continue to require:

- a. An assessment of the person's presenting needs;
- b. A decision based on that assessment as to which of those needs (if any) are eligible for support; and
- c. Provision of services to meet those eligible needs, now more commonly in the form of a cash direct payment although individuals have and will retain the right to request a service instead of a direct payment.

40. Again, as noted above in relation to children, we see nothing to stop a forward-thinking local authority from choosing to integrate its section 47 assessment process into the EHC assessment process and accepting a duty pursuant to CSDPA 1970 s 2 to meet those social care needs identified in a young person's EHC Plan. Again, however, there is no obligation on a local authority to adopt such a co-ordinated approach and in any event there would need to be a stand-alone section 47 assessment mechanism for those

disabled young people and young people with SEN (and of course older disabled adults) who are not the subject of an EHC Plan.

*E. In what way would the current proposal for an EHC Plan affect, change or improve access to health services for disabled children and young people and those with SEN?*

41. As in relation to social care services, we do not see why the switch from Statements to EHC Plans should result in any change or improvement of access to health services for disabled children and young people. As with Statements, there will be no duty on NHS bodies including CCGs to provide any of the health provision specified in the Plan.

42. We note that in his evidence to the recent Education Select Committee inquiry on the draft Bill, the Minister stated that it would be difficult to impose any duties on health agencies under the Bill 'within the NHS constitution, any delivery of services has to be based on clinical need'. With respect, we simply do not understand this evidence. Firstly, we are not aware of any provision of the Constitution which would prohibit NHS bodies such as CCGs having a specific duty to provide health services as set out in an EHC Plan. Secondly, the objection which the Minister puts forward, that delivery of services has to be based on clinical need, would plainly be met in this case – because any health service specified in an EHC Plan would only be there as a result of the health element of an EHC assessment process.

43. Moving away from the absence of any specific health duties, and as noted above, two very significant opportunities to promote the delivery of improved health services for disabled children and young people and those with SEN are missed in the way the general duties are drafted:

- a. Clause 26(3)(a) only requires joint commissioning arrangements to consider and agree health provision 'reasonably required by the special educational needs of the children and young people concerned' – which as noted above is in our view nonsensical; and

- b. Clause 31, which requires CCGs and others to co-operate with others in individual cases, is subject to the strong caveat in clause 31(2)(b) that these bodies need not co-operate if to do so would ‘have an adverse effect on the exercise of its functions’ – which on our reading is effectively a blanket exemption in relation to any request which would cost any significant sum of money, for instance funding a particular type of therapy or providing a piece of equipment. This wholly undermines the purpose of the scheme, being to provide joined up planning and provision for children and young people with SEN (if not all disabled children and young people).

*F and G. What would be the range of social care and health services that local authorities and their partner CCGs would be required to commission under clause 26 (joint commissioning arrangements)?*

44. Clause 26(3)(a) requires local authorities and partner CCGs<sup>10</sup> to make arrangements to ‘consider and agree’ the ‘EHC provision reasonably required by the special educational needs of the children and young people concerned’. As noted above, if read literally this would lead to the contradictory situation that only social care and health care provision required to meet special educational needs should be commissioned.
45. If the words ‘special educational needs’ are deleted in clause 26(3)(a) (and if ‘disabled’ children are included within in clause 26(1)), then each local area would be required to ‘consider and agree’ what social care and health provision is reasonably required to meet the needs of disabled children and those with SEN who require social care and health input and would then have to determine what provision is to be secured and by whom it is to be secured (clause 26(3)(c) and (d)). It is however notable that clause 26 does not in terms impose a duty actually to commission any provision.

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<sup>10</sup> Being a CCG which falls wholly or partly within the local authority’s area; clause 26(8).

46. The clear intention behind clause 26 is that there will be joint commissioning of a reasonable level of social care and health provision to meet the needs of children who have special educational needs (although not at present 'disabled' children without SEN). However, to answer the question posed, there is nothing in clause 6 which directs or even indicates what provision should be commissioned – other than that it should be reasonably sufficient to meet the anticipated range of needs.

47. It is therefore obvious that there are very many ways that a local authority and its partner CCGs could comply with this duty, including responses which provide real practical benefits for children and families and responses which would make little if any practical difference. The only way in which the duty would be breached as we see it is if a local area had failed to commission a reasonable level of an important social care or health service, for example short break care. While this may not add significantly to the existing duties on local authorities<sup>11</sup>, we can see the value of this duty in relation to CCGs, as we are not aware of any existing duties which require CCGs to commission services specifically for disabled children and young people (or as currently drafted, children and young people with SEN).

*H. How would clause 26 improve or strengthen current duties to undertake joint commissioning for education, health and care provision by local authorities and health services?*

48. At present, the key duty which requires local authorities and NHS bodies to co-operate to safeguard and promote the welfare of children (including disabled children and children with SEN) is contained in section 10 of the Children Act 2004. This requires each local authority in England to make arrangements to promote co-operation with its relevant partners 'with a view to improving the well-being of children in the authority's area'. This is mirrored at a more general level by section 82 of the NHS Act 2006, which requires

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<sup>11</sup> See for example para 6 of Schedule 2 to the Children Act 1989, as amended by section 25 of the Children and Young Persons Act 2008, which now requires local authorities to provide short break services to assist disabled children and their families.

health bodies and local authorities to co-operate in order to 'in order to secure and advance the health and welfare of the people of England and Wales'.

49. The primary way in which clause 26 adds to this existing duty is by specifying that the 'co-operation' between local authorities and CCGs must include the making of joint commissioning arrangements – as opposed to (for example) separate commissioning arrangements with some kind of liaison or case referral mechanism.

50. Two other important features of clause 26 are:

- a. Clause 26(3), which specifies a range of matters which must be agreed within the joint arrangements, including what EHC provision is to be secured and by whom it is to be secured; and
- b. Clause 26(4), which requires (at sub-clause b) arrangements to be made for 'securing the EHC provision set out in EHC plans'. This clearly falls short of a specific duty to make social care and health provision according to the plans in every case (otherwise clause 42 which imposes this duty in relation to special educational provision would be otiose) but it does at least establish a general duty to do so, which could be breached if a local area (for example) never provided any of the health provision specified in its EHC Plans.

*1. What would be the range of social care services that would fall under clause 27 (duty to keep education and care provision under review)?*

51. The key duty in clause 27 as presently drafted is for the local authority to keep under review the social care provision 'made in its area for children and young people who have special educational needs'; clause 27(1)(a). Again, we do not understand this drafting, as the local authority would have no duty to review social care provision made for disabled children who do not have special educational needs.

52. However, at least it is clear that pursuant to clause 27(2), the purpose of the review is to consider whether the available provision is sufficient to meet both the special educational needs and the social care needs of the children and young people concerned – but again, this relates presently solely to children with SEN who also have social care needs.

53. The range of services which fall within the duty imposed by clause 27 are those within the definition of ‘social care provision’ in clause 21(4), being provision made by a local authority in the exercise of its social services functions. In short, this would mean any specialist or targeted provision being offered by a local authority pursuant to Children Act 1989 Part III, Chronically Sick and Disabled Persons Act 1970 s 2 and potentially a range of other social care statutes – for example section 117 of the Mental Health Act 1983 in relation to mental health after-care services. This would certainly include key social care services such as short break services or befriending schemes / social skills groups.

*J. What would be the range of services that would fall under clause 30 (‘local offer’)?*

54. The ‘local offer’ as set out in clause 30 is simply a requirement on local authorities to publish information about services which it expects to be available inside and outside its area for children and young people who have special educational needs. As such we consider that this duty to provide information on local services will provide little tangible benefit to children and young people with SEN (or disabled children and young people were the scope of the Bill to be so extended, as we recommend). This is particularly so given that there is nothing in clause 30 which requires a local authority to progressively increase the nature and range of the services it offers over time; the duty is merely to publish information on the services it ‘expects to be available’, which leaves room for local offers to be vague and unhelpful to parents.

55. Although again the target group for this duty excludes disabled children who do not have SEN, the provision about which information must be published includes all 'EHC provision' including health and social care provision; clause 30(2)(a). The local authority must also publish information about 'other educational provision', training provision, travel arrangements for schools and post-16 institutions and provision 'to assist in preparing children and young people for adulthood and independent living'. This last point includes provision relating to finding employment, obtaining accommodation and participation in society; clause 30(3).

56. It should also be noted that pursuant to clause 30(9), regulations may also require a local authority's local offer to include information about how to obtain an EHC assessment and information about other sources of information and advice and support for children and young people with SEN (but not disabled children) and their families.

*K. What statutory levers does clause 30 create to hold local authorities to account for the delivery of what is set out in their local offer?*

57. None. The duty imposed by clause 30(1) is solely to publish information about expected services. There is no duty on the local authority or any of its partners to actually provide any of the services set out in the local offer – albeit that as a matter of common law rationality it would be unlawful for a local authority to include within its local offer services which it knows or ought to know are in fact unlikely to be available. However we consider that given the breadth of this duty it is likely that many local offers will be drafted in vague and unhelpful terms.

58. The only accountability mechanisms created by clause 30 are the duty to publish the local offer and the requirement to respond to comments about the local offer from children, young people and parents 'from time to time' (sub-clause 6). This may allow disabled children and young people, parents and local groups to assess whether the services set out are reasonably sufficient



to meet local needs and to compare local areas with their neighbours or appropriate comparator areas, and then to make representations to the local authority on how their local offer should be improved. However there is no obligation under clause 30 for the local authority to actually improve services as a result of any representations – merely to respond to the comments.

*L. How could a local authority be challenged if the information in their local offer is inaccurate or misleading?*

59. Clause 30 does not establish any kind of appeals process in relation to the local offer. As such, the primary route to redress in relation to an inadequate local offer would be via the local authority complaints procedure and then on as required to the Local Government Ombudsman.

60. If a local authority simply failed to publish a local offer, or if the document is flawed on public law grounds (for example, the local authority rely on a service being available that in fact has closed as a result of government funding cuts) then this could be challenged by way of an application for judicial review in the High Court. However families may well struggle to obtain legal aid for such a challenge as it is not immediately obvious what tangible benefit would accrue to families even if an improved local offer was published, given the limitations on this duty as set out above.

*M. Do the draft provisions strengthen rights to social care services for parent/carers of disabled children and/or children with SEN?*

61. No. Nothing in the Children and Families Bill requires or empowers a local authority to provide services to parent/carers of disabled children. All of the general duties relate solely to children and young people, not to parent/carers, other than the duty to provide information in clause 32 which applies to both parents and young people.

*N. Do the draft provisions of the Children and Families Bill and the draft Care and Support Bill give equivalent rights to social care services for parent/carers of disabled children and/or children with SEN as those afforded to carers of disabled adults?*

62.No. As noted above, the Children and Families Bill is silent on the question of support for parent/carers of disabled children. By contrast, one of the primary purposes of the draft Care and Support Bill is to give ‘carers a right to support for the first time to put them on the same footing as the people for whom they care’; introduction to draft Care and Support Bill at 2.6.

63.However by virtue of clause 10(3) of the draft Care and Support Bill, a ‘carer’ is ‘an adult who provides or intends to provide care for another adult’. It is therefore clear that parent/carers of disabled children aged under 18 are excluded from these new entitlements to services on an equal footing to the person cared for.

64.Parent/carers of disabled children are therefore left with the existing statutory scheme under the Carers (Recognition and Services) Act 1995, the Carers and Disabled Children Act 2000 and the Carers (Equal Opportunities) Act 2004. As is well known, while these Acts impose obligations on the local authority to assess parent/carers needs, there is no specific statutory duty to provide services to meet carers’ assessed needs. Although practice guidance issued by SCIE in 2005 indicates that where a carer’s assessment identifies a ‘critical’ risk there is an obligation on a local authority to ‘make an appropriate response to address this risk’, this falls short of a statutory duty to provide carer’s services.<sup>12</sup>

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<sup>12</sup> See Broach, Clements and Read, *Disabled Children: A Legal Handbook* (LAG, 2010) at 8.20-8.22 for more on these issues.

## CONCLUSION

65. We hope that this opinion provides some assistance to EDCM in understanding the potential impact of Part 3 of the Children and Families Bill on disabled children and young people and those with SEN.

66. Part 3 of the Bill promises a radical transformation of the system, but for the reasons set out above we consider that its practical benefit will be limited. Most fundamentally, disabled children and young people and those with SEN will not have any new right to a joined up package of education, health and care services. Given the high expectations of the draft Bill amongst parents and carers, as noted by the Select Committee report, we are firmly of the view that if the final Act closely resembles the Bill as introduced to Parliament this will lead to widespread disappointment. We suggest that the Government either amends the legislation so that the final Bill fulfils the promise of a new joined-up system or accepts the limitations of the current Bill and instead proposes a more modest set of amending measures to the current system.

67. Finally, we would also note and endorse the comments made by the Law Commission in its report on at paras 11.42-11.43:

11.42 The existing overlap in law creates an awkward relationship between adult social care and the Children Act. At consultation there was widespread confusion amongst service users and professionals over which legislation can apply to children and which can apply to adults. In general terms, we consider that our scheme should apply to those aged 18 and over, subject to a mechanism to allow for transitional service provision (discussed below).

11.43 We recognise concerns that the provision of services to children may continue to be governed by various different statutes, most notably the Chronically Sick and Disabled Persons Act 1970. Although the provision of services to children is strictly speaking beyond the remit of our review, in our view both Governments should consider amending the Children Act to

incorporate the same rights to services for disabled children that are currently contained in adult social care legislation.

68. The proposals contained in the Children and Families Bill do nothing to improve the confused statutory picture in relation to disabled children's rights to social care support. Indeed, these proposals actually increase the complexity and scope for confusion by introducing EHC Plans which appear to provide entitlements to social care support for a limited number of disabled children but in fact do not.

69. We confirm that we are content for this opinion to be published and used by EDCM in whichever way is considered to be appropriate.

Dated 20 February 2013

IAN WISE QC  
STEPHEN BROACH  
Doughty Street Chambers

ALEX ROOK  
Irwin Mitchell Solicitors