Responsibility for children in your area: disputes under the Children Act 1989 and Children and Families Act 2014

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The Children Act 1989

Within the local authority's area

1. Section 17(1) of the Children Act sets out:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children **within their area** who are in need; and
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> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
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> by providing a range and level of services appropriate to those children's needs."

2. Section 20(1) sets out:

> "(1) Every local authority shall provide accommodation for any child in need **within their area** who appears to them to require accommodation as a result of—
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> (a) there being no person who has parental responsibility for him;
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> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

3. A summary of the position in relation to the term "within their area" is as follows:

    a. The term covers physical presence only;

    b. This is a different concept to 'ordinarily resident';

c. A child is within a local authority's area if, for example, they are temporarily accommodated in the area, go to school in the area, or sleeping rough in the area.

4. The breadth of the term "within their area" is wide. If a child is physically present in the local authority's area then it would be a very bold decision to defend a judicial review on the basis that they are not within the authority's section 17 duty. The tide of the case law is to include children as within the section 17 duty, and the Court has readily dismissed resource-based arguments by authorities (see for example paragraph 35 of **J v Worcestershire**, below).

The cases

5. In **R (Stewart) v Wandsworth, Hammersmith & Fulham and Lambeth** (2001) 4 CCLR 467, the Court set out the breadth of the term "within their area". Ms Stewart and her children lived in Hammersmith and Fulham but became homeless, and H&F provided accommodation in Lambeth. H&F then found Ms Stewart was intentionally homeless. The children attended school in Wandsworth.

6. Mr Jack Beatson QC, sitting as a Deputy HCJ, set out the following principles:

a. There must be physical presence in the area, which could be temporary and for any purpose.

b. This may mean multiple local authorities are responsible, but this is not an objection – for example, many children live with one parent half the week and with another parent for the rest of the week.

c. This meant Lambeth and Wandsworth were under a section 17 duty; Hammersmith were not responsible as the children were no longer in its area.

d. He noted that there may be an exception to the physical presence case where a local authority "dumps" on another a child in order to get rid of any statutory duties. However what constitutes "dumping" has never been defined (see e.g. **AM v Havering** paragraph 33(xii), see below).

7. This "physically present" test is reflected in the 'London Child Protection Procedures' which states:

> "6.1.2…Increasingly, homeless families are placed for extended periods in other local authority areas; sometimes they may choose to continue to access some universal services within their originating authority (e.g. education). However, as set out in 6.1.4, this does NOT determine responsibilities under the Children Act 1989 for safeguarding and promoting the welfare of the children of such families…
>
> 6.1.4 Regardless of the reasons or circumstances of families moving between local authority areas, the Children Act 1989 is clear about where the responsibility for safeguarding and promoting the welfare of such children lies (Section 17 and Section 47): it is with the local authority responsible for the area in which the child is to be "found", i.e. where they are at the time that a concern may arise, which will normally be where they are living." (emphasis added)

8. In **R (Liverpool CC) v Hillingdon LBC** [2009] EWCA Civ 43, it was made clear a local authority does not discharge a section 20 duty by escorting a child to another area. Liverpool CC had assessed an asylum seeker as being an adult and the Home Office had accommodated him in Hillingdon. Hillingdon assessed him as being a child, and following a request by the child, escorted him back to Liverpool. Liverpool CC judicially reviewed the actions of Hillingdon.

9. The Court of Appeal held the child remained the responsibility of Hillingdon because Hillingdon had not discharged its duty. A child's wishes and feelings had to be considered as part of an overall assessment and Hillingdon had not undertaken an assessment of any kind.

10. In **R (HA) v LB Hillingdon** [2012] EWHC 291 (Admin), the Court dealt with the issue of interim accommodation, particularly in relation to an age assessment. Hillingdon had assessed HA as over 18 and UKBA had placed him in Birmingham. HA argued he was a child and Hillingdon had breached their section 20 duty to him.

11. Bean J, held that in the interim and pending final judgment, Hillingdon was not entitled to rely on its age assessment where that very assessment was the basis of challenge. This is a potentially surprising conclusion given there are many authorities to say a decision is presumed lawful until declared otherwise for the purposes of interim relief.

12. In **R (J) v Worcestershire CC** [2014] EWCA Civ 1518, the Court dealt with the difficult case of a child in a travelling fairground family. Provision was sought from Worcester but to be provided

at the locations where the family were. Worcester's defence was that section 17 gave no power to make out of borough provision.

13. The Court of Appeal took account of the purpose of section 17, namely to provide services for children in need. There was a power within section 17 to provide out of borough provision, but the local authority was entitled to take into account the child's connection to the area, and whether the child will ever return, in deciding what provision to give.

14. In **R (AM) v Havering and Tower Hamlets** [2015] EWHC 1004 (Admin), the Court held that once a local authority had begun an assessment of needs it had to complete the assessment. Tower Hamlets had begun a section 17 assessment whilst temporarily accommodating the family in Havering pursuant to section 190 of the Housing Act 1990. It terminated the temporary accommodation, and then purported to transfer responsibility to Havering.

15. Cobb J held that:

    a. The duty to assess was on LB Havering, because the children were within their area.

    b. However, as Tower Hamlets had already begun a section 17 assessment, there was a public law duty to complete that assessment in the absence of good reason. Where a person moves out of the area, *"the local authorities in relation to whom the burden falls should liaise over who should complete the assessment, and how it should best be done, to avoid duplication of effort whilst ensuring that the child does not "fall between two stools""*.

    c. He noted that where local authorities owe concurrent duties, there should be co-operation and share of the burden. A child should not be passed from "pillar to post" whilst authorities argue – needs should be met first and redistribution of resources after.

16. This judgment is reflected in the 'London Child Protection Procedures' which states at paragraph 6.3.1:

> "If a family moves whilst subject to child protection enquires under s47 (CA 89) or an assessment of need under S17 (CA 89), those assessments are concluded before transfer of case responsibility takes place. This ensures that services are working together to limit the extent to which children and families are exposed to having to repeat their stories and repeat work to overcome child

protection concerns. However, where a family has only been resident in the originating authority for a short period of time, then the respective authorities should consider who is best placed to undertake the assessment. This is especially important for those families who have moved frequently between authorities thereby preventing any authority or professional network from getting to know them."

Ordinary residence and recoupment

17. The ordinary residence of a child is preserved under section 105(6) of the 1989 Act:

"(6) In determining the *"ordinary residence"* of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place—

(a) which is a school or other institution;

(b) in accordance with the requirements of a supervision order under this Act; or

(ba) in accordance with the requirements of a youth rehabilitation order under Part 1 of the Criminal Justice and Immigration Act 2008; or

(c) while he is being provided with accommodation by or on behalf of a local authority."

18. There are two reasons why this remains relevant.

19. Firstly, under section 20(2) a local authority who provides a child accommodation who is ordinarily resident in the area of another local authority, that other authority can take over provision of accommodation where given notice in writing:

"(2) Where a local authority provide accommodation under subsection (1) for a child who is ordinarily resident in the area of another local authority, that other local authority may take over the provision of accommodation for the child within—

(a) three months of being notified in writing that the child is being provided with accommodation; or

(b) such other longer period as may be prescribed in regulations made by the Secretary of State."

20. Secondly, a local authority can recover the cost of providing accommodation and maintenance under section 20 of the 1989 Act from another local authority, where the child was ordinarily resident in that other local authority's area, pursuant to section 29(7):

> "(7) Where a local authority provide any accommodation under section 20(1) for a child who was (immediately before they began to look after him) ordinarily resident within the area of another local authority or the area of a local authority in Wales, they may recover from that other authority any reasonable expenses incurred by them in providing the accommodation and maintaining him."

Disputes

21. A dispute as to whether a child is within a local authority's area is a matter for judicial review of that local authority's decision.

22. If there is a dispute as to ordinary residence (which is relevant to recoupment), the matter shall be determined by the Secretary of State: section 30 of the 1989 Act.

Children and Families Act 2014

23. Like under the 1989 Act regime, where a child has a EHC Plan there are two issues that arise in relation to the correct local authority:

    a. Who is responsible for the administrative functions of the EHC Plan, for example the Annual Review, implementing provision, etc; and

    b. Who is financially responsible for the implementation of the EHC Plan.

Administrative functions

24. Section 24 sets out responsibility under the Children and Families Act 2014:

> "(1) A local authority in England is responsible for a child or young person if he or she **is in the authority's area** and has been—

(a) identified by the authority as someone who has or may have special educational needs, or

(b) brought to the authority's attention by any person as someone who has or may have special educational needs." (emphasis added)

25. The Code of Practice is not particularly helpful. Paragraph 10.8, albeit in the context of looked after children only, states:

> "Local authorities who place looked after children in another authority need to be aware of that authority's Local Offer if the children have SEN. Where an assessment for an EHC plan has been triggered, the authority that carries out the assessment is determined by Section 24 of the Children and Families Act 2014. This means that the assessment must be carried out by the authority where the child lives (i.e. is ordinarily resident), which may not be the same as the authority that looks after the child."

26. The reference to ordinary residence may confuse, as section 105(6) of the 1989 Act states specifically that where a child is placed elsewhere by a local authority that does not by itself alter ordinary residence.

27. A related concept is where child or young person with an EHC Plan moves area. This is dealt with under regulation 15 of the SEND Regulations 2014:

> "15. Transfer of EHC Plans
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> (1) This regulation applies where a child or young person in respect of whom an EHC plan is maintained moves from the area of the local authority which maintains the EHC plan ("the old authority") into the area of another local authority ("the new authority").
>
> (2) The old authority shall transfer the EHC plan to the new authority ("the transfer") on the day of the move or, where it has not become aware of the move at least 15 working days prior to that move, within 15 working days beginning with the day on which it did become aware.
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> (3) From the date of the transfer—
>
> (a) the EHC plan is to be treated as if it had been made by the new authority on the date on which it was made by the old authority and must be maintained by the new authority; and
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> (b) where the new authority makes an EHC needs assessment and the old authority has supplied the new authority with advice obtained in pursuance of the previous assessment the new

authority must not seek further advice where the person providing that advice, the old authority and the child's parent or the young person are satisfied that the advice obtained in pursuance of the previous assessment is sufficient for the purpose of the new authority arriving at a satisfactory assessment.

(4) The new authority must, within 6 weeks of the date of the transfer, inform the child's parent or the young person of the following—

(a) that the EHC plan has been transferred;

(b) whether it proposes to make an EHC needs assessment; and

(c) when it proposes to review the EHC plan in accordance with paragraph (5).

(5) The new authority must review the EHC plan in accordance with section 44 of the Act before the expiry of the later of—

(a) the period of 12 months beginning with the date of making of the EHC plan, or as the case may be, with the previous review, or

(b) the period of 3 months beginning with the date of the transfer…"

28. A similar provision in force under the previous regime, the Education Act 1996, was considered in **JG v Kent County Council and ors** [2016] EWHC 1102 (Admin). As to whether a child "moves" was to have the effect where a new authority becomes "responsible" for the child or young person – under the current regime, that is fulfilment of the section 24 criteria that firstly, the child is in the authority's area, and secondly, has been identified by the authority or brought to the authority's attention as someone who may have special educational neds.

29. As to what "move" meant:

"133. I agree that it is necessary to distinguish a situation where there has been a permanent move from one which is temporary or transitory. As Ms Hannett and Mr Harrop-Griffiths agreed, there can only be one local authority which is responsible for a child's special educational needs. I also agree with Ms Hannett, that the procedures envisaged in reg 23 would be excessively cumbersome to cater for a purely temporary, short-term absence of the child from the original authority's area. I agree as well that it is of assistance to see whether there has been an alteration of the child's ordinary residence to reach a decision as to whether the child has

'moved' for the purposes of reg 23 . The features which have been identified in other contexts for deciding a person (and especially a child's) ordinary residence may be helpful.

134. At the same time, there are limits on the usefulness of this methodology. The term 'ordinary residence' (or 'habitual residence') is not used in the regulation or the enabling statute. That distinguishes this situation from that which faced the courts in the authorities which Ms Hannett cited to me. I have already alluded to one important difference. There can be only one local authority which is responsible for a child's special educational needs, whereas a person may have an ordinary residence in more than one place (see for instance *R (Cornwall County Council) v Secretary of State for Health [2015] UKSC 46, [2016] AC 137* , at [42]). The features identified in the ordinary residence cases are therefore no more than indirect pointers in deciding whether in this case TG had 'moved' to Sunderland at the time that KCC took its decision which the OS challenges on 19 October 2015."

30. In addition, the Court held that the decision by a local authority that a child had moved was subject only to review on a Wednesbury unreasonableness basis. On the facts of the case, the LA had acted unlawfully.

31. One may argue that given the similarity in wording to section 17 of the 1989 Acct, the scope of responsibility of section 24 of the 2014 Act must be similar. However that, in the education context, would be too wide. This is reflected in the judgment of **JG**, and the following reasons are relevant:

    a. A child is often placed out of county. It cannot have been intended that where a child is placed out of county, the EHC Plan becomes the responsibility of the host authority.

    b. Only one local authority has responsibility of an EHC Plan (on this point, compare section 17, which specifically found a child may be "in" more than one area).

32. In summary, the test of whether a child or young person is "in a local authority's area" is one which involves presence, but additionally involves a degree of permanence. The test of ordinary residence (see **R (Cornwall CC) v Secretary of State for Health** [2015] UKSC 46) may be informative but not comprehensive.

Financial responsibility

33. Under the Education Act 1996, the financial responsibility was often separate to the administration of a Statement of Special Educational Need. The logic behind this position was as follows:

    a. A local authority was responsible for an EHC Plan where a child was "in their area" and fulfils one of four criteria (section 321(3) of the 1996 Act).

    b. However, where someone "belongs" was to determined by regulations (section 579(4) of the 1996 Act), in this case The Education (Areas to which Pupils and Students Belong) Regulations 1996 ("**the Belonging Regulations**").

    c. The Belonging Regulations provide for the financial responsibility of a Statement. However, specifically, the Belonging Regulations do not provide guidance on who has administrative responsibility for a Statement (regulation 2(4)).

34. The position under the 2014 Act is not altogether clear. As far as I can tell, the Belonging Regulations are not referred to within the 2014 Act. Therefore, it is arguable that they have no relevance and financial responsibility coincides with administrative responsibility.

35. In my view that seems to be a surprising conclusion. It is possible the draftsman just did not think about the issue. There seem to be two indications that the Belonging Regulations remain relevant.

36. Firstly, section 2(4) of the Belonging Regulations has been amended to include the new EHC Plan regime – *"These Regulations do not apply for the purposes of determining which authority's area a child is in for the purposes of section 321(3) of the Education Act 1996 and section 24 of the Children and Families Act 2014*" (emphasis added). This is consistent with the argument the Regulations do apply.

37. Secondly, there is a very opaque provision at section 83(7) of the 2014 Act which may lend some support:

> "(7) EA 1996 and the preceding provisions of this Part (except so far as they amend other Acts) are to be read as if those provisions were contained in EA 1996."

On one interpretation, this reads section 24 of the 2014 Act as if it is in the 1996 Act – and therefore this would include section 579(4) of the 1996 Act and therefore the Belonging

Regulations do apply. If this was the intention, this is far from clear from section 83(7) of the 2014 Act, but it is one possibility.

38. Assuming (as I do think) the Belonging Regulations do remain relevant, then it is those which set out the financial responsibility. A summary of the position is as follows:

    a. Subject to the other regulations, a person is treated as belonging to the education authority in which he is ordinary resident, but if he has no ordinary residence, the area for which he is for the time being resident (regulation 3).

    b. A child or young person with an EHC Plan who is boarding and does not spend holidays with the person responsible for him, the student belongs to the authority where the person responsible is ordinarily resident (regulation 4).

    c. A child or young person with an EHC Plan and attends a special school belongs to the authority where the person responsible is ordinarily resident (regulation 5).

    d. A looked after child with an EHC Plan belongs to the authority which coincides with or includes the area of the local authority which looks after him (regulation 7).

39. The person responsible is set out at regulation 2(3):

> "(3) References in these Regulations to the person responsible for a school pupil are to—
>
> (a) the parent with parental responsibility for him,
>
> provided that if the parents of a school pupil with parental responsibility for him live in different education authority areas—
>
> (i) the person responsible for the pupil shall be the parent with parental responsibility for him with whom the pupil is habitually and normally resident,
>
> (ii) if the pupil is habitually and normally resident with more than one parent with parental responsibility for him, the person responsible for the pupil shall be the parent who is ordinarily resident nearest to the school attended by the pupil or to the place at which the pupil receives education otherwise than at school,

(iii) if the pupil is not habitually and normally resident with a parent with parental responsibility for him, the person responsible for the pupil shall be the parent who is ordinarily resident nearest to the school attended by the pupil or to the place at which the pupil receives education otherwise than at school; or

(b) where there is no parent with parental responsibility for him, to the person (not being a local authority) who has care of him when he is not attending school or living in boarding accommodation or in hospital."

40. Confusingly, ordinary residence is not the same concept as under the Care Act 2014 – it in fact means "habitually resident" as set out in regulation 2(2):

"(2) References in these Regulations to the place where a person is ordinarily resident are references to the address where that person is habitually and normally resident apart from temporary or occasional absences, except that no school pupil shall be treated as being ordinarily resident in the area of an education authority by reason only of his residing as a boarder at a school which is situated in the area of that authority."

41. The "habitual residence" test has arisen in family proceedings relating to cross-country custody rights of children. In Re A [2013] UKSC 60 the Supreme Court approved of European jurisprudence on whether an individual is habitually resident in a place. The Supreme Court held "habitual residence" is a question of fact and not law – and that question is centred on whether the factors "are capable of showing that…presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment".

42. The Belonging Regulations place the emphasis on the habitual residence of the responsible person. This case law would be applied – the question is a factual one to see where the responsible person is present and whether that is more than temporary.

Disputes

43. If a local authority refuses to take on the administrative functions of a EHC Plan because it is asserted the child is not "within their area", that may arise in the context of an appeal to the FTT under section 51(2) of the 2014 Act (e.g. refusal to assess). However this matter may also be dealt with by way of judicial review.

44. In the event of one local authority alleging another authority is financially responsible, section 579(4) of the 1996 Act states a determination is to be made by the Secretary of State. However, unlike in other areas, there are no regulations or statutory guidance as to how that determination is made. I would suggest the following steps:

    a. Writing to the authority which is alleged to be financially responsible, providing a time for a response and suggesting a meeting to discuss.

    b. Agreeing a schedule of facts.

    c. Each authority putting submissions to the Secretary of State, and requesting a determination.

45. A determination by the Secretary of State is binding. However that determination is judicially reviewable, if an error of law has been made.

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