Children's Continuing Care Network

SUMMARY ADVISE

SESLIP
South East Sector Led Improvement Programme

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Threshold for referrals

What the advice says in plain English

If there is a reasonable possibility of a health need, the referral should not be screened out. Local authorities may only provide services where healthcare input is incidental or ancillary and of a type they can be reasonably expected to provide.

Relevant case law/examples

R v North and East Devon HA ex p Coughlan [2001] QB 213 – The NHS must fund care where the primary need is a health need.

R (T) v London Borough of Haringey [2005] EWHC 2235 (Admin) – confirms Coughlan applies equally to children

Practical implications

If there is a reasonable possibility that the care required is more than social care, an assessment should be undertaken

Triaging

What the advice says in plain English

Triage is allowed, but only as a flexible guide and as a tool to decision making. It should not become a hidden or fixed rule. Triage should not fetter discretion or lead to irrational decisions
Triage tests should not be applied to decide eligibility before proper consideration of the child's circumstances.

Relevant case law/examples

British Oxygen Co Ltd v Minister of Technology [1971] AC 610 – sets out that public bodies may adopt policies to guide decision making but cannot apply them so rigidly as to preclude consideration of individual circumstances.
This was confirmed in ***R (Rogers) v Swindon NHS Primary Care Trust [2006] EWCA Civ 392; R (Condliff) v North Staffordshire PCT [2011] EWCA Civ 910*** – it was accepted in this case that resource-allocation frameworks are permissible, but only where they allow structured but flexible prioritisation.
R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12 – public authorities should not operate unpublished or de facto rules

Practical implications

Blanket rules such as "three highs required before an assessment will take place" can be challenged as they are potentially unlawful

Rejecting referrals on initial information

What the advice says in plain English

Rejecting too early may be unlawful if there is evidence suggesting current health needs. Overall needs should be assessed in the round.

Relevant case law/examples

R v North and East Devon HA ex p Coughlan [2001] QB 213
R (T) v London Borough of Haringey [2005] EWHC 2235 (Admin)

Practical implications

If it is considered that a decision has been made without all of the necessary information, then the decision can be challenged.

Delays in assessment due to child not being “optimised”

What the advice says in plain English

Refusal to assess because a child is not yet optimised, diagnosed, or treatment is incomplete is not a valid ground to refuse assessment.

Relevant case law/examples

Wednesbury [1948] 1 KB 223 – sets out a decision is unlawful if it is so unreasonable that no reasonable authority could reach it

R (Rogers) v Swindon NHS Primary Care Trust [2006] EWCA Civ 392 – a decision to refuse to fund a cancer drug was held irrational and unlawful as the claimant was treated differently from others on arbitrary grounds

Practical implications

Current needs should be considered now. A decision could be considered unlawful if there is a refusal to assess until the child is “optimised”.

Assessments not being undertaken due to pending ADHD, autism or psychological assessments

What the advice says in plain English

Pending neurodevelopmental or psychological assessment should not be used to reject a referral. Needs exist whether or not there is a final diagnosis.

Relevant case law/examples

R (T) v London Borough of Haringey [2005] EWHC 2235 (Admin)

R (A) v Croydon LBC [2009] UKSC 8 – public bodies cannot delay determining eligibility to avoid duties

Practical implications

The focus should be on the current presentation, risks and support required, and whether that is a health need.

Identifying health needs

What the advice says in plain English

A need is likely a health need where it involves - Clinical judgment, Skilled interventions, Risk of deterioration/death, Invasive procedures, Use of restraint linked to a medical condition

Relevant case law/examples

Juttla *[2018] EWHC 267 (Admin)*

Even if care is arranged to support parents or enable respite, it remains healthcare if it addresses clinical needs – the classification depends on the nature of the care delivered, not its wider purpose.

R (T) v London Borough of Haringey [2005] EWHC 2235 (Admin) – supervision required because of medical risk is healthcare, even when it appears passive.

Practical implications

If support/monitoring is to monitor risk of things like suffocation, seizures and/or sudden death, then supervision cannot be considered social oversight and would be a health need. Local Authorities can provide supervision, behavioural management and support within a social care scope, as long as it does not require clinical intervention.

Grounds for challenging ICBs - Illegality

What the advice says in plain English

Potential grounds for challenging ICBs are: -

- Illegality – for example where specific case law has not been applied

Relevant case law/examples

R (Lumba) v Secretary of State [2011] UKSC 12

Authorities must follow lawful published policies and any hidden or informal policies are unlawful.

Practical implications

If areas of challenge are identified, an application could be made for judicial review for a Court to consider whether the decision was appropriate – the Court could make declarations or mandatory orders as a result of any judicial review application.

Grounds for challenging ICBs - Irrationality

What the advice says in plain English

Potential grounds for challenging ICBs are: -

- Irrationality – where a decision is considered irrational, such as saying a child needs to be optimised before assessment as to needs can take place

Relevant case law/examples

Wednesbury [1948] 1 KB 223 - A decision is unlawful if it is so unreasonable that no reasonable authority could reach it

***R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392 –** concluded that a refusal to fund a cancer drug based on restrictive criteria was irrational and unlawful – this could be relevant if restrictive criteria is used to refuse continuing care.

Practical implications

If areas of challenge are identified, an application could be made for judicial review for a Court to consider whether the decision was appropriate – the Court could make declarations or mandatory orders as a result of any judicial review application.

Grounds for challenging ICBs – Procedural unfairness

What the advice says in plain English

Potential grounds for challenging ICBs are: -

- Procedural unfairness – e.g putting in place barriers to assessment

Relevant case law/examples

R (QA) v Secretary of State for Foreign, Commonwealth and Development Affairs **[2024] EWHC 3064(Admin)**

Would a fair-minded and informed observer conclude that there was a real possibility of bias. If so, it could be considered procedurally unfair.

Practical implications

If areas of challenge are identified, an application could be made for judicial review for a Court to consider whether the decision was appropriate – the Court could make declarations or mandatory orders as a result of any judicial review application.

Grounds for challenging ICBs – Fettering discretion

What the advice says in plain English

Potential grounds for challenging ICBs are: -

- Fettering discretion – e.g using thresholds to triage

Relevant case law/examples

***British Oxygen* [1971] AC 610 (HL) –** Authorities can adopt policies, but cannot apply them so rigidly that they exclude individual consideration

***R (Condliff) v North Staffordshire PCT* [2011] EWCA Civ 910 –** sets out that resource-allocation frameworks are permissible, but only where they allow for flexibility, not rigid exclusion – thresholds or scoring systems can be used as tools, not as a determinative rules.

***R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 –** public authorities should follow and properly apply lawful policies, and must not operate unpublished or de facto rules. E.g – if an ICB applies an internal "3 highs and above" rule, which is not in published guidance, it could be open to challenge.

Practical implications

If areas of challenge are identified, an application could be made for judicial review for a Court to consider whether the decision was appropriate – the Court could make declarations or mandatory orders as a result of any judicial review application.

Cost allocation

What the advice says in plain English

Funding should reflect the nature of the task and the substance of care provided. The correct way to do this is to analyse each task and identify which are health or social care components, and then proportionately allocate the cost.

Practical implications

Consideration to be given to whether the costs have been fairly allocated depending on which tasks are health care versus social care.

Well managed needs

What the advice says in plain English

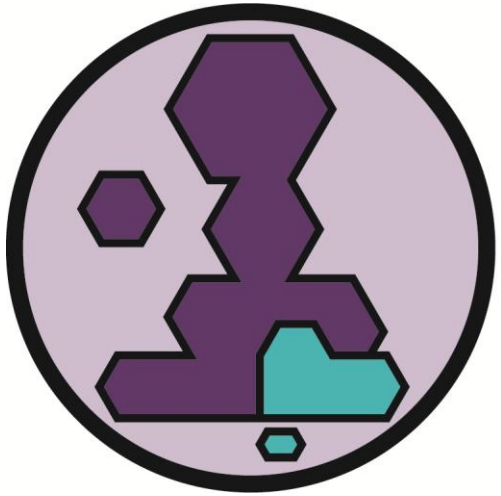
A need does not stop being a need just because it is being managed effectively. A need still needs to be fully recognised when ongoing care, monitoring, treatment or specialist intervention is required to maintain health, safety or wellbeing.

Assessments should consider what actions are being taken to manage the condition, rather than the appearance of the condition being stable. Examples of what should be considered are: -

- What care is being provided each day?
- Who is delivering that care?
- What level of knowledge, training, or clinical skill is required?
- What interventions are being used?
- What may happen if those interventions were withdrawn?
- How frequently does monitoring take place?
- What risks remain despite the current management plan?

Practical implications

If managed needs require ongoing intervention then they are relevant. Needs that are controlled through medication, supervision or specialist care must still be considered, as well as the level of skill, monitoring and support required. A need should not be discounted just because it is not currently presenting as problematic due to care/support being provided.



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