

The Funding Criteria for Child Care Proceedings

A Consultation Paper

March 2007

Contents

How to respond	3
Introduction	4
Part A - The Merits Criteria for Special Children Act Proceedings	4
Financial Eligibility	5
Merits Criteria for the Child	6
Merits Criteria for Parents and Those With Parental Responsibility	6
Practical Application of the Merits Criteria	8
Part B – Residential Assessments	9
Funding Code Exclusion	10
Questions for Consultees	12

How to respond

We would encourage you to email your response. If you do send your response in this way, please put the words 'Funding Criteria Consultation Response' in the subject heading of your response and email it by **Thursday 24 May 2007** to family@legalservices.gov.uk

Alternatively, responses can be posted or faxed to the following details, to arrive by **Thursday 24 May 2007**:

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We would ask you to ensure that your consultation response is sent to us only once, as this will make it easier for us to compile and monitor responses.

In accordance with the Freedom of Information Act 2000, the Legal services Commission may publish your name and the contents of your response. If you do not wish these details to be disclosed, this will be taken into consideration if a request for such information is received. If you have concerns about any disclosure you should mark your response clearly to identify the areas to withhold. In any event, responses will be disclosed in an anonymous or summary format.

Introduction

This paper proposes some important changes to the scope and criteria for funding legal representation in public law family proceedings. We are proposing new Funding Code Criteria to ensure that public funding is directed where it will achieve the greatest benefits for clients. Along with the fee schemes being introduced in October 2007 and April 2008 - see our consultation paper *Legal aid Reform: Family and Family Mediation Fee Schemes* - these changes to the Funding Code, also planned for October, will help to ensure that the scheme as a whole is sustainable in the longer term.

Part A – The Merits Criteria for Special Children Act Proceedings

1.1 The Lord Chancellor's direction on priorities dated 1st February 2000 specifies that Special Children Act Proceedings (as defined in the Funding Code) are a top priority for legal aid funding. There are no plans to change this. These proceedings have the most fundamental impact on funded clients. The Funding Code defines Special Children Act Proceedings as: -"

"... proceedings under the Children Act 1989 (other than appeal proceedings) where Legal Representation is applied for on behalf of:-

- (i) a child in respect of whom an application is made for an order under –
 - (a) *Section 31 (a care or supervision order);*
 - (b) *Section 43 (a child assessment order);*
 - (c) *Section 44 (an emergency protection order); and*
 - (d) *Section 45 (extension or discharge of an emergency protection order).*
- (ii) *any parent of such a child or person with parental responsibility for the child within the meaning of the 1989 Act;*
- (iii) *a child who is brought before a Court under Section 25 (use of accommodation for restricting liberty) who is not, but wishes to be, legally represented before the Court".*

1.2 The Code specifies that there are no merits criteria for Special Children Act Proceedings. This position is unique in the Code and contrasts with other high priority areas such as mental health and immigration. For example where a client's liberty is at stake in proceedings before the Mental Health Review Tribunal funding is still subject to a Reasonableness test administered by suppliers.

1.3 Under Regulation 3(1)(c) of the CLS (Financial) Regulations 2000 all Special Children Act cases are exempted from means testing and contributions.

1.4 These rules make funding an absolute entitlement for all clients within the scope of the above definition. In the great majority of cases this is entirely appropriate. However, in some cases these rules lead to funding being granted for individual cases which cannot be considered a priority for funding, or where the client's interest in the case does not justify the level of representation provided.

- 1.5 The existing rules lead to parties being legally represented throughout the length of the proceedings even when they may lack any separate or sufficient interest in the outcome of the case. It is in the nature of any regime of public funding that funded representation should generally be limited to clients who have a positive case to put before the Court. For example the current rules would provide for a parent who has had little involvement with his or her child to be represented continuously through care proceedings even if the client has no distinct argument to put before the Court.
- 1.6 These Rules have also given rise to judicial concern. See, for example, *Merton LBC –v- K [2005] 2 FLR 422* where Baron J commented: *I wish to make it clear that public funds should not be used to enable parties to be represented unless they have a positive case which has to be placed before the court. Henceforth, I am of the clear view that, if parties are joined (at a late stage) in this type of case, counsel and solicitors (i) have a positive duty to set out why they are actually required to be represented in court and (ii) must inform the Legal Services Commission in writing of the precise reasons why scarce public funds should be made available for the trial. This part of my judgment will be sent to the Legal Services Commission and I suggest that they draw up a new procedure for public law cases to ensure that only parties with a legitimate need are represented throughout the hearing.*
- 1.7 The rising cost of legal aid for Special Children Act Proceedings is well documented¹. It is by far the fastest rising area of civil expenditure, costs having doubled between 1999/00 and 2004/05. In 2005/06 bills paid by the LSC in Special Children Act Proceedings approached £209 million, a significant proportion of total expenditure. It is therefore necessary to consider whether all the existing rules on legal aid entitlement for these cases remain fit for purpose, both in terms of priorities under the Scheme and in the context of the new fixed fee regime.

2.0 Financial Eligibility

- 2.1 Introducing any form of means test for Special Children Act Proceedings would have a negligible impact on funding for children. In relation to parents, the Review of Child Care Proceedings demonstrated that more than 84% of parents involved in care proceedings are on income support. Of the remaining 16% it is likely that the majority would, in any event, be financially eligible under existing rules. Any means testing would therefore only affect a very small number of cases. Further, the typical high costs of Special Children Act Proceedings would make private funding unrealistic for the majority of clients somewhat above the means threshold.
- 2.2 There may, of course, be a very small minority of parents, typically the non-resident parent, who may have significant means and who can be expected to contribute to the cost of proceedings. In addition a non-resident father may not have parental responsibility and may not necessarily have had any involvement in the issues leading to the commencement of the proceedings. However, in light of the importance of the cases to the client and the significant administrative costs likely to flow from any change in financial eligibility, we do not recommend any change to the existing exemption from means testing.

¹ see Review of the Child Care Proceedings System in England & Wales, DCA, May 2006; Lord Carter's Review of Legal Aid Procurement, July 2006, pages 49 to 51.

- 2.3 A related issue is whether, if any limited form of merits criteria were introduced, the resources of a parent should be a relevant factor in the decision whether it is reasonable to continue funding. This is considered further below.

3.0 Merits Criteria for the Child

- 3.1 It would be very difficult to apply any substantive merits test to an application from a child who is the subject of care proceedings. 60% of children in care proceedings are under the age of six. Since the object of the proceedings is to determine what is in the best interests of the child, it would not be appropriate to apply merits criteria by reference to achieving any particular outcome.
- 3.2 This issue must, however, be considered in the context of the new standard fee regime where it is proposed that solicitors who represent more than one child will receive an enhanced standard fee rather than a separate fee for each child. This approach is based on the assumption that, as now, solicitors will represent more than one child in cases where there is no conflict of interest (conflicts, including with the CAFCASS guardian, are unlikely where the children are young).
- 3.3 It is, of course, important in a standard fee regime that where there are no conflicts of interest, all children should be represented by the same legal team. That is, however, difficult to achieve where legal aid is set out as an absolute entitlement for each child. Any unnecessary separate representation of children would cause substantial unnecessary costs and a duplication of effort.
- 3.4 It is therefore proposed that from October 2007 there should be one qualification to the existing rules in relation to children. There should be a test as to whether the child is in need of separate representation from other children who are the subject of the proceedings. The test whether a party needs to be separately represented applies throughout the rest of the Funding Code under Standard Criterion 5.4.5. We propose that in relation to children in Special Children Act Proceedings, entitlement under the Funding Code is made expressly subject to Criterion 5.4.5 but no other criteria.

4.0 Merits Criteria for Parents and Those With Parental Responsibility

- 4.1 As explained above we wish to continue to fund the great majority of parties we currently fund in Special Children Act Proceedings. However, we wish to consult on introducing limited merits criteria for parents and persons with parental responsibility which are aimed at excluding the minority of individual cases where funded representation or continued funded representation for the client cannot be considered a priority. The parties we may wish to exclude from automatic funding throughout the case will include the following:-
- Those with no separate or sufficient interest in the outcome of the proceedings, sufficient to justify their representation. This will often be related to the past and likely future degree of involvement of the client with the child.
 - Parties who have no positive or distinct case to put to the Court.

- Clients who require representation but where, in the absence of any conflict of interest, the interests of the client can be protected by being jointly represented with another party.
- Clients who disengage from proceedings or cease to give instructions.
- Clients who require proceedings to be conducted unreasonably or at unjustifiable expense.

4.2 We have considered whether it would be appropriate to impose specific prospects of success criterion for all parties. It should be noted that 50% of children are not living at home with their parents when care proceedings are commenced and in 70% of cases the child is permanently removed from their parent. A similar percentage of children have previously been known to local authority children's services for some time and are on the Child Protection Register when proceedings are started. However, we do not believe that strict prospects of success test would be appropriate given the nature of these proceedings. The prospects of the client achieving the outcome they wish from the proceedings could instead be just one part of a wider discretion as to whether public funding is justified. The individual needs and circumstances of the client must always be taken into account in cases of such fundamental importance. Figures from the Care Proceedings Review show that 22% of parents involved in care proceedings have learning difficulties and some applicants have mental health and/or abuse problems.

4.3 We therefore propose that any new merits criteria should be in the form of a general Reasonableness test, rather than stricter criteria which appear elsewhere in the Code. It would, of course, be wrong to have stricter criteria for parents and those with parental responsibility in Special Children Act Proceedings compared to the criteria which apply to other public law Proceedings. The Funding Code has specific criteria for "Other Public Law Children Cases" which also covers other parties joined into Special Children Act Proceedings. In some cases other public law proceedings, such as contested adoption, will be no less important to the client than care proceedings or other non-merits tested cases. The criteria currently applicable to Other Public Law Children Cases as set out at 11.9 of the Code Criteria are as follows:-

- A standard refusal criterion where alternative funding exists.
- A standard refusal ground where representation is not necessary (taking into account any other parties who are already represented in the proceedings).
- A prospects of success test which applies only to clients who are making or supporting an application or appeal. In such cases funding can be refused if the prospects of the application or appeal being successful are Poor.
- A general Reasonableness criterion under which Legal Representation may be refused "if it appears unreasonable for funding to be granted, having regard to the importance of the case to the client and all other circumstances".

- 4.4 It is proposed that these criteria should be applicable to all parties to Special Children Act Proceedings other than the child. Note that the prospects of success test above is unlikely to be applicable to most care proceedings where the parent will usually be opposing rather than bringing or supporting the application in question.
- 4.5 The key element of such criteria will be the Reasonableness test. It is proposed that guidance under this test would highlight the categories of case and client listed at paragraph 4.3 above. Consultees are, however, asked for views as to whether some or all of the considerations there are so significant that they should be spelled out in the Code Criteria themselves. Guidance would also identify other factors which would never by themselves result in refusal or discharge of funding, but which could be taken into account as part of the overall discretion. Prospects of success is the best example of this. In other words whilst the mere fact that the client has no realistic prospects of achieving the outcome they seek in the proceedings would not be fatal, but that fact combined with the client requiring the proceedings to be conducted at unjustifiable expense or not having any separate arguable case or interest in the proceedings should lead to withdrawal of funding.
- 4.6 The concept of reasonableness, of course, allows all circumstances to be taken into account. One of these could be the client's financial resources. In a rare case where an absent parent has significant resources but only a limited interest in the proceedings that could also be a contributory factor in withdrawal of funding.

5.0 Practical Application of the Merits Criteria

- 5.1 It is clear from the nature of the test proposed that it will be rare for funding to be refused at the outset for parents or parties with parental responsibility in Special Children Act Proceedings. Often at the start of care proceedings it will be unclear what the key issues are, what the likely outcomes will be and what each client is seeking to achieve in the case. It might be an unnecessary administrative burden or lead to delays if all applications for funding were thoroughly vetted by the Commission at the outset of each case.
- 5.2 We therefore propose that there be a new devolved power for suppliers to grant Legal Representation for parties in Care and Supervision Proceedings. Like all devolved powers, the reasons for each decision must be recorded on the file justifying why funding is reasonable in the particular case. It will also be within the powers of the LSC to restrict devolved powers either for individual suppliers or generally in particular circumstances.
- 5.3 A devolved power would replace the existing provisions of the Funding Code procedures under which legal aid is deemed to be granted prior to an application to the Commission being made (Rule C7 of the Procedures). The power would also apply subject to all requirements to report potentially high cost cases under the new case planning system. Operation of the devolved power would need to be monitored closely in the initial months.
- 5.4 Any new devolved power would need to be combined with clear reporting obligations on suppliers to send cases in to the Commission when there is doubt as to the justification for continued funding. Guidance will specify when

the obligation to report arises. It is proposed that reporting would be appropriate in the following circumstances:-

- Where the issues in the case have been identified and it has become clear that the client has no reasonable prospect of securing the outcome they seek in the case.
- Where the client no longer has a separate or sufficient interest in the proceedings to justify their representation.
- Where the client's interest in the proceedings is no longer sufficiently distinct from that of other parties to justify separate representation.
- Where the client has disengaged/ceased to give instructions for, say, 28 days.

5.5 Such obligations would be in addition to the general reporting obligations contained in the Contract and Rules C43 and C44 of the Code procedures. A reporting obligation would also be consistent with the new standard fee regime. Whilst a single standard fee is payable for Legal Representation in Special Children Act Proceedings, only half of the fee may be claimed if funding does not continue to the end of the case. This regime creates a clear incentive for suppliers to report well before the final hearing if there is doubt as to whether funding should continue to the end. It will, however, be important for suppliers to keep the merits under review at all stages, especially in higher cost cases which will continue to be paid on an hourly rate basis.

5.6 The amendments to the Funding Code proposed by these changes are annexed to this paper. If it is decided to proceed with merits testing in Special Children Act Proceedings after consultation, detailed guidance, and associated form changes will be drafted in light of the consultation responses and subject to a brief further consultation before implementation.

Part B – Residential Assessments

6.1 In order to ensure a sustainable civil legal aid scheme for the future the limited resources available to the legal aid budget must not be diverted outside of its proper remit. One area where funds are currently being diverted in such a way is through the use of residential assessments of children and their parents/potential carers in Special Children Act proceedings, under Section 38 (6) of the Children Act.

Section 38(6) Children Act 1989 states:

'Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment.'

6.2 The provision has been extended by case law to residential assessments of babies and young children, together with their parent or parents, in circumstances where the court decides that evidence on parenting or the child's

welfare requires an assessment undertaken on this basis. Local authorities have previously objected to such assessments on principle (as unjustified, either at all or because a community based assessment would be sufficient).

- 6.3 Following on from decisions in *Calderdale Metropolitan Borough Council v S* [2004] EWHC 2529 (Fam) and the *London Borough of Lambeth v S and C and V and J* [2005] EWHC 776 (Fam), publicly funded clients have increasingly been directed to meet the costs of expert assessments, including residential assessments in Special Children Act cases.
- 6.4 The consequence of the decisions above is that local authorities are usually directed by the court to bear a minority share of the costs of assessments and that the accommodation and subsistence expenses of the assessed parties for the total assessment period are usually apportioned equally with the majority share borne by the individual parties and therefore funded from the legal aid budget. Furthermore, although the case law envisages a discount or allowance in favour of the funded clients to reflect Local Authority obligations post interim care order to place the child, discounts are rarely directed.

7.0 Funding Code Exclusion

- 7.1 Paragraph 1.3 of the Funding Code, specifically provides that the costs of or expenses in relation to treatment, therapy, training or other interventions of an educative or rehabilitative nature may not be charged as disbursements under any level of service unless authorised by specific orders or directions from the Lord Chancellor.
- 7.2 This paragraph was amended in July 2005 but has not had the intended effect of protecting the legal aid budget from payment for treatment and other excluded work.
- 7.3 The distinction between work required as substantive evidence for the court and social or other therapeutic work is not clearly made by residential assessment centres. Centres maintain that no excluded work is included in the work to be undertaken and some have re-presented their literature accordingly although there is no clear breakdown of the work included.
- 7.4 The decision in *Re G* [2005] UKHL 68 made it clear that an assessment of the capacity of the parent to change falls outside the ambit of section 38(6) as does assessment for the purposes of rehabilitation of the family. The proposed assessment should be of the child and human rights obligations do not extend "to being made a better parent at public expense". The case also made it clear that it would be unusual for more than 2 or 3 months at the most to be required for a residential assessment. However, following *Re G* applications for prior authority sought by solicitors indicate that residential assessments continue to be directed and in some cases are longer than the 12 weeks envisaged by the House of Lords.
- 7.5 In the recent case of *Re V* [2006] EWHC 1861 (Fam) the court overturned a previous decision of the family proceedings court that the whole cost of a residential assessment be met by the local authority because the family proceedings court considered that such work would include treatment and therapy. The decision on appeal in this case indicated that the court should look to the whether any treatment, therapy or other excluded work was

incidental to the assessment and if it was, it properly fell within section 38(6) and was a cost that could be met by the legal aid budget.

- 7.6 The high costs of these assessments is not sustainable for the legal aid budget. It has always been a fundamental principle of legal aid to place the publicly funded client in the same position as a privately paying client of moderate means. In addition it is always open to an adult client to choose not to be represented. Privately funded clients or clients in person would be unlikely to be expected to bear these costs and attributing these costs to the publicly funded client could be considered in breach of s22 (4) Access to Justice Act 1999 which provides that there cannot be increased liability just because a client is publicly funded.
- 7.7 In an adversarial system it is the duty of the local authority to make its case thoroughly. Reliance on residential assessments and waiting lists for placements contribute to delay and increased costs in court proceedings. There is little evidence that these assessments add sufficient value to the legal process to justify the costs and delay. The outcome of many of these cases is that children are made the subject of care orders. It is not appropriate that the legal aid budget be used in this way.
- 7.8 We therefore propose to remove Residential Assessments including viability assessments conducted on a residential basis from the scope of public legal aid funding. The purpose of this proposal is to put into effect the intention of Re G, that assessments of the capacity of the parent to change and assessments of the family for the purposes of rehabilitation fall outside the ambit of section 38.6.

Questions for Consultees

Part A – Merits Criteria for Special Children Act Proceedings

1. Do you agree that within Special Children Act Proceedings there are some clients for whom funding is a lower priority than others? Please give examples of such cases.
2. Do you agree that there should be no change to the financial eligibility rules for Special Children Act Proceedings? Should the financial position of clients ever be relevant to any Reasonableness test?
3. Do you agree that funding for children in Special Children Act Proceedings should remain an absolute entitlement, subject only to the test for separate representation under criterion 5.4.5?
4. Do you agree with the list of parties who might be excluded from funding by a merits test as given in paragraph 4.1?
5. In what way, if at all, should the likelihood of the client achieving the outcome they seek in the proceedings be taken into account in any merits test?
6. Are the existing criteria for Other Public Law Children Proceedings also appropriate for parties other than the child in Special Children Act Proceedings? If not, what criteria would be appropriate?
7. How should the Commission approach any discretion as to Reasonableness in merits criteria for Special Children Act Proceedings?
8. What do you think would be the impact of the funding criteria proposed in this consultation? What proportion of clients are likely to be excluded under such criteria initially or during the course of the case?
9. At what point in the proceedings is application of the merits criteria likely to have an impact? Is it correct that relatively few cases could be excluded under merits criteria at the outset of the case?
10. Do you support the introduction of a new devolved power for suppliers to grant Legal Representation in Special Children Act Proceedings? How should that power operate in practice?
11. At what stages and in what circumstances should suppliers report cases to the LSC? Is the list of reporting obligations at paragraph 5.4 above appropriate?
12. To what extent should the new standard fee regime influence the way in which any merits criteria are applied?

Part B – Residential Assessments

13. Do you agree that these assessments are outside the ambit of the legal aid budget as they are primarily about possible rehabilitation and are likely to involve treatment, therapy, or other rehabilitative work?

14. Are there any costs of these assessments that rightly fall to the client and therefore should be funded from the legal aid budget? Please give examples of these.
15. Do you agree that these assessments generally add insufficient value to the outcome of proceedings to justify the delay and costs involved given the availability of community based assessment? If not can you give examples of the benefits to publicly funded clients from undergoing these assessments at the very significant costs involved?