

21. Other Category-Specific Guidance

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21.1 Employment

1. Most proceedings in the employment franchise category, whether before the Employment Appeal Tribunal or the civil courts, will be considered under the General Funding Code. Particular reference will therefore need to be made to chapters 9 and 11 of this guidance. In addition, the following guidance should be applied.

Excluded Services (Criterion 4.3)

2. Because paragraph 1(h) of Schedule 2 to the Access to Justice Act excludes matters arising out of the carrying on of a business, claims before the Tribunal or the civil courts brought by former employees who were de facto controlling the business (e.g. as a director or manager) may be excluded from the scope of the scheme – see section 3.10 of this guidance.

Alternative Funding (Criterion 5.4.2)

3. In employment cases the availability of alternative funding from a trade union should be considered and, if appropriate, the application refused on the basis of that availability. See Section 9 of this guidance.

Cost Benefit: Quantifiable and Unquantifiable claims (Criteria 5.7.3 and 5.7.4)

4. Claims for wrongful dismissal sometimes include a claim for reinstatement in addition to a claim for damages. If a claim is purely for damages, or the claim for reinstatement is speculative or unlikely to succeed, the correct approach is to apply the cost benefit Criterion at 5.7.3, i.e. to treat the case mainly as a case for damages.
5. Similar issues apply in Employment Appeal Tribunal cases. If any claim for reinstatement is speculative or unlikely to succeed, and the only real issue is that of compensation, then again the Criterion at 5.7.3 will apply. Otherwise, if there is a good case for reinstatement, then the privately paying client Criterion in 5.7.4 must be applied.
6. In some cases, Employment Appeal Tribunal cases may raise issues of wider public interest – see Section 5 of this guidance.

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21.2 Debt

1. Proceedings in the debt franchise category are likely to be considered under the General Funding Code Criteria (see also chapters 9 and 11 of this guidance).

Other Levels of Service (Criterion 5.4.4)

2. An application may be refused if it appears more appropriate for the client to be assisted by some other level of service under the Code. In debt cases, particularly when the client is a defendant, the availability of Legal Help and Help at Court needs to be carefully considered before granting an application for Legal Representation. Such an application should be refused where there is no legal defence to the claim brought, and where the only issue in the proceedings or proposed proceedings relates to the timing and method of payment. Thus, for example, Legal Representation is

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unlikely to be granted to be represented on an application for an administration order, a review of an administration order, or to defend enforcement proceedings when only the timing and method of payment are in issue.

3. This Criterion also allows the refusal of Legal Representation if the application is premature. In claims for payment of a debt, it would be expected that a written demand for payment of the debt had been made and that the proposed defendant has been given a reasonable time to make payment or confirm whether or not liability was denied.

The Need for Representation (Criterion 5.4.5)

4. Legal Representation is unlikely to be granted for the purpose of negotiating arrangements with creditors, either because there are no proceedings in relation to which it can be granted or because judgment has already been obtained and/or liability is not in dispute.

Investigative Help (Criterion 5.6)

5. Investigative Help is unlikely to be granted in relation to a debt action because of the requirement at 5.6.2 for the prospects of success of the claim to be unclear and for substantial investigative work to be required before those prospects can be determined. In most debt actions, a sensible estimate of the prospects of success can be made at an early stage either on the client's instructions or after an exchange of correspondence with the proposed opponent.

Prospects of Success (Criterion 5.7.2)

6. Section 4.2.4 of this guidance defines a successful outcome where the client is the defendant to debt proceedings.

Cost Benefit – Quantifiable and Unquantifiable Claims (Criteria 5.7.3 and 5.7.4)

7. Where the client is the claimant or proposed claimant in the proceedings, then a claim for a debt action will be quantifiable and the cost benefit Criterion at 5.7.3 must be satisfied.
8. Where the client is a defendant, the matter will be treated as an unquantifiable claim and Criterion 5.7.4 will apply. Legal Representation will not be granted to defend a debt claim or bankruptcy proceedings where no personal benefit will be gained by the client, e.g. because of other undisputed debts outstanding which would lead to bankruptcy or insolvency in any event.

21.3 Consumer and General Contract

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1. Proceedings in the consumer and general contract franchise category are likely to be considered under the General Funding Code Criteria (see also chapters 9 and 11 of this guidance).

Excluded Services (Criterion 4.3)

2. The exclusion from scope of matters arising out of the carrying on of a business (Access to Justice Act Schedule 2 paragraph 1(h)) will restrict the grant of Legal Representation in this category but will not prevent consumers from bringing claims against the business which provided the goods or services. However, claims will be excluded under paragraph 1(a) of Schedule 2 if they involve allegations of negligently caused damage to property (for example by a builder working on or near the client's property).

Alternatives to Litigation – Criterion 5.4.3 and General Contract Building Cases

3. An application for Legal Representation is likely to be refused where there is a building contract which has a binding clause which provides for resolution of a dispute by independent arbitration and which will be enforced having regard to the Consumer Arbitration Agreement Act 1988 or where reference can be made to arbitration such as under the Coal Mining Subsidence Act. The applicant may also have a policy of insurance covering the claim in such cases in which case Legal Representation will be refused under Criterion 5.4.2 (Alternative Funding).

Cost Benefit – Quantifiable and Unquantifiable claims, Criteria 5.7.3 and 5.7.4

4. In applying the cost benefit Criterion in 5.7.3, special regard should be had in consumer and general contract cases to the ability of the defendant to meet the claim.
5. Further, Legal Representation is unlikely to be granted if the relief is sought to recover an item and an order for costs is unlikely so that the operation of the statutory charge would result in no substantial benefit being received by the client.
6. In surveyors' negligence claims on property purchase the likely damages for the purpose of applying the cost benefit Criterion will usually be the difference between the price paid and the true value of the property and this difference must be sufficient so as to justify representation under those Criteria.
7. Where the client is a claimant in a building case, Legal Representation is unlikely to be granted where the defendant is no longer trading or it is unlikely that any judgment will be satisfied within a reasonable time or where the claim is likely to give rise to a meritorious defence and counterclaim of similar value.

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3C-222 21.4 Mental Health

1. The mental health Criteria (section 12 of the Funding Code) apply to applications for Legal Representation before the Mental Health Review Tribunal under the Mental Health Act 1983. Legal Representation before the Tribunal may only be granted as Controlled Legal Representation under the General Civil Contracts.
2. Judicial review applications in the mental health franchise category will be dealt with under the judicial review Criteria (section 7 of the Funding Code – see also section 16 of this guidance). Examples include applications to enforce the obligation contained in section 117 of the Mental Health Act 1983 on the Health Authority and local Social Services Authority to provide after-care services to those discharged following admission under sections 3, 37, 47 or 48 of the Mental Health Act 1983.
3. Other applications for Legal Representation in mental health cases will be dealt with under the General Funding Code. These include applications under section 29 of the Mental Health Act 1983 to displace a nearest relative. The applicant for Legal

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Representation may be the nearest relative opposing the application to the court by an approved social worker or another relative of the patient or a person with whom the patient is living or was living before admission to hospital and who is to apply to the court.

4. In either case the following additional guidance should be applied:

Other Levels of Service (Criterion 5.4.4)

5. Legal representation may be refused if the application appears premature or if it appears more appropriate for the client to be assisted by some other level of service under the Code.
6. This will be particularly relevant to section 117 applications. Legal Help or Controlled Legal Representation may be more appropriate to be used in relation to issues concerning after-care, for example to pursue correspondence or a complaint to obtain appropriate care or, in relation to a Mental Health Review Tribunal case, to ensure that the provision of such care is considered. In any event, Legal Representation is unlikely to be granted until any available and effective review or complaint processes have been exhausted unless, in the particular circumstances of the case, it would not be appropriate, e.g. due to the excessive delay in pursuing such processes as against the time in which an outcome could be likely to be obtained in court proceedings. Further, it is likely to be appropriate to obtain information regarding the need for facilities and a letter before action should be written before an application for Legal Representation will be considered.

Proceedings and limitations

7. In section 29 cases, as the reasonableness of the nearest relative's objections to admission to hospital for treatment, guardianship or discharge are considered objectively, it is likely to be appropriate to limit a certificate which covers defending proceedings to obtaining an independent psychiatric and/or social worker's report to consider that issue at the earliest opportunity. This will only be justified where the other circumstances of the case, including the history of the patient and the previous conduct of the relatives justify the grant of Legal Representation.

21.5 Education

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1. Proceedings in the education franchise category are likely to be considered under the General Funding Code. Education damages claims are considered at paragraphs 2 to 11 below. For Judicial Review of education decisions, and the need for certain challenges to be made in the name of the parent rather than the child, see paragraphs 12 to 15 below.

Excluded Services (Criterion 4.3)

2. Paragraph 1(a) of Schedule 2 to the Access to Justice Act excludes services relating to allegations of causing personal injury. Therefore claims against local education authorities which are exclusively for personal injuries arising out of the allegedly negligent care of a child will be excluded.
3. However, claims against local education authorities for damages for common law negligence in the discharge of their statutory education function (such as claims for costs of extra tuition or loss of future prospects of employment arising from a failure to meet special educational needs) will not normally be excluded on scope grounds. In these education cases the primary allegation will often be that the child had a pre-existing condition, usually dyslexia, which the local authority negligently failed to

identify and act upon. It will not be alleged that the local authority negligently caused the original condition, although in many cases it will be said that the actions or inaction of the local authority made matters worse and in a general sense caused further harm to the child. The leading authority on claims of this type is the House of Lords combined judgments of 17th July 2000 in *Phelps v. London Borough of Hillingdon, Anderton v. Clwyd CC and Jarvis v. Hampshire CC*. Although Phelps decided that such cases may be regarded as personal injury claims for the purpose of pre-action disclosure rules, they should, in general, not be treated as relating to personal injury for the purposes of scope and should therefore not be refused on that basis. If the application includes some allegations that the local authority caused additional harm to the child, this can still be funded as a mixed claim if the allegations of harm are minor or incidental to the main claim or if it is impracticable to separate out the personal injury aspects of the claim.

Prospects of Success (Criterion 5.7.2) and Cost Benefit (Criterion 5.74)

4. Claims for damages for negligence in relation to education functions, whether in dyslexia cases or otherwise, will usually fall under the General Funding Code and are not, therefore, a priority area for CLS funding. Education cases as a class do not give rise to a significant wider public interest although rarely an individual claim may do so on its own facts. Generally, however, these cases should be considered as normal quantifiable claims under the General Funding Code and therefore subject to the cost benefits matrix for full representation at Criterion 5.7.3.
5. *Phelps* has established that local authorities can be vicariously responsible for the negligent acts or omissions of employees (such as educational psychologists or teachers) which cause damage to the educational prospects of a child. However, the House of Lords made it plain that such claims should be relatively rare in that there must be clear and identifiable mistakes by individuals employed or controlled by the local authority which gave rise to the matters complained of (as opposed to simply less than ideal provision of educational services). The negligent acts must be so closely connected with the individual child that a duty can be established. Such a nexus will usually exist when an educational psychologist has been brought in to advise the authority on the needs of an individual child, where it is clearly likely that the child will lose out if the psychologist performs his or her duties negligently.
6. The House of Lords made it plain that the appropriate test as to whether there has been negligence is set out in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118. Under that test a professional person is not guilty of negligence if he or she has acted in accordance with a practice accepted as proper by a responsible body of professional people skilled in that area of work. The fact that there may be another body of opinion which takes a contrary view is not enough to establish negligence.
7. Although the Commission only funds educational negligence cases when the client's solicitors and counsel estimate the prospects of success and recovery satisfy the Funding Code, the proportion of funded cases which succeed is small. Solicitors and counsel must take account of the limited circumstances in which educational negligence can be shown, and the true extent of any likely settlement or award.
8. Proceedings based on an education authority's failure to perform a duty are unlikely to succeed, even where the client was out of school for a long time: *DN v London Borough of Greenwich* [2005] EWCA Civ 1659. A failure to fulfil a responsibility towards a child with special educational needs may, exceptionally, succeed where the claimant is able to show that the authority's decision is one which no reasonable local authority could make: *Carty v London Borough of Croydon* [2005] EWCA Civ 19.
9. Where there is liability for educational negligence, a court will not generally award damages for loss of earnings on the multiplier/multiplicand basis that is usual in

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clinical negligence or other personal injury cases. Identifiable loss of earnings may be attributed to the failure to diagnose a single educational difficulty, such as dyslexia, although the amount of earnings lost may be low (£25,000 in *Phelps*). But where the client's difficulties were more severe and less tractable, a court is more likely to award the kind of sum recoverable in proceedings for childhood sexual abuse or 'wrongful birth': *DN* (above).

Investigative Help (Criterion 5.6)

10. It will usually be difficult to assess prospects of success at the time of the initial application for funding in an education claim. Most applications will therefore be for Investigative Help to obtain discovery of relevant papers and review the merits. At the Investigative Help stage an application will not usually be refused on the grounds that the case has potential for a conditional fee agreement, but see section 10.2 and 11.2 of the guidance and paragraph 11 below. However, the most important criteria to apply is likely to be 5.6.4 (Prospects after Investigation). The certificate should only be granted if there are reasonable grounds for believing that when investigative work has been carried out the claim will be strong enough, in terms of prospects of success and cost benefit, to satisfy the relevant criteria for Full Representation. Even if investigations demonstrate a prima facie case, education claims are seldom straightforward. Many will have prospects of success in the 50 to 60% band, in which case they will need to show a damages to costs ratio of 4:1. By definition at the investigative stage precise judgment cannot be made as to whether these criteria will ultimately be satisfied, but unless there are reasonable grounds for believing they will be satisfied the application for Investigative Help should be refused.

Conditional fee agreements (Criterion 5.7.1)

11. Funding for education damages cases considered under the General Funding Code can be refused on the grounds that they are suitable for a Conditional Fee Agreement. See criteria 5.6.1 and 5.7.1 and sections 10.2 and 11.2 of the guidance. This will usually be considered in relation to cases with prospects of success of at least 60%. In such cases evidence will be required of attempts to obtain CFA funding and insurance. A certificate will only be granted if attempts have been made to obtain a CFA but it is not, in practice, viable for the individual case. In all cases, the strict criteria for prospects of success and cost benefit will, of course, need to be satisfied.

Applications in the Name of the Child

12. In proceedings concerning the provision of education it is often necessary to consider whether the proper applicant for funding is the parent, the child concerned or some other person. For example, if a funding application is made in the name of a child but it is considered that the child's parent would be the more appropriate applicant, funding will be refused under Code Criterion 5.4.2 which provides for refusal where there are other persons who could reasonably be expected to bring or fund the proceedings. Who is the correct applicant depends on the nature of the challenge and in particular on whose rights are primarily in issue in the proceedings.
13. In private law proceedings this will usually be easy to determine. In a damages claim concerning failure to provide adequate education, bullying or race discrimination it will generally be the child who is the only proper claimant and whose means would be taken into account in the application for funding.
14. For tribunal cases Legal Representation is not generally available but Legal Help may be available to assist in preparation for tribunal hearings. In education matters rights of appeal to a tribunal, panel or adjudicators invariably vest in the parent

rather than the child. See, for example, Section 94 of the Schools Standards and Framework Act 1998 in relation to admissions, Section 67 of that Act in relation to exclusions and Sections 325 and 326 of the Education Act 1996 in relation to special educational needs. For Legal Help in all such matters the parent is the proper applicant whose means are taken into account.

15. Judicial review raises the most difficult issues because the court rules on standing will often be wide enough to allow either a parent or a child to challenge a decision in an education matter. Our approach to education judicial reviews is as follows:
 - (a) **School closure and reorganisation cases.** These cases by their nature concern not just an individual applicant but all parents and children affected by the closure or reorganisation. Therefore, whether the application is in the name of the child or parent we will always consider whether it is reasonable for the wider group of people affected by the case to fund all or part of the proceedings. These cases will be considered under the guidance at Section 5.5, whether or not it is accepted that the school closure or reorganisation has significant wider public interest. Depending on the financial position of the wider group refusal may be appropriate under Criterion 5.4.2. In other cases shared funding or matched funding will be appropriate. Questions of alternative funding in such cases will generally be referred to the Special Cases Unit.
 - (b) **Admissions cases.** Statutory rights in relation to choice of school will be treated as rights of the parent rather than the child. Applications will therefore be refused under Criterion 5.4.2. Indeed, applications in such cases in the name of the child may be seen as an abuse (see *JC. v. Richmond LBC* 2001 ELR 21, 31 July 2000).
 - (c) **School transport cases.** In challenges to local education authority decisions to refuse to pay for transport between home and school it is necessary to consider in each case whether it is primarily the rights of the child or the rights of the parent which are in issue. Where a child is already attending a school so that the child's continued education at that school is in issue, the child may well be the appropriate applicant for funding. However, in other cases a challenge to a refusal to pay transport costs may simply be an aspect of a dispute as to parental preference for a particular school. Questions of whether a school transport challenge in the name of a child should be refused under Criterion 5.4.2 may be referred to the Policy and Legal Department for guidance.
 - (d) **Other education judicial reviews.** The most common areas are challenges to decisions on school exclusions and failures to provide or give effect to statements of special educational needs. Exclusion and special educational needs cases are essentially concerned with the rights of the child. We will therefore generally be prepared to accept judicial review applications in the name of the child in such cases based upon the child's means. However, we would reserve the right in individual cases to consider the means of the parents if representations were received to the effect that the means of the parents were so substantial that it would not be reasonable for the matter to be wholly publicly funded.

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21.6 Welfare Benefits

1. Proceedings in the welfare benefits franchise category will either be judicial review cases or be considered under the General Funding Code.
2. In judicial review cases, the Criteria are set out in section 7 of the Funding Code (see also chapter 16 of this guidance).

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Full Representation – Appeal from the Social Security Commissioners – Cost Benefit (Criterion 5.7.4)

3. Appeals on points of law from the Social Security Commissioners will usually be treated as unquantifiable claims and the cost benefit Criterion in 5.7.4 will apply.

Prospects of Success – Judicial Review (Criteria 7.4.5 and 7.5.3)

4. It is important to remember that, in judicial review cases, the prospects of success must be the prospects of obtaining a substantive order, not of the applicant's ultimate prospects in the claim he or she is making, e.g. for a particular welfare benefit. However, this may be relevant – see below.

Judicial Review Cases – Cost Benefit (Criteria 7.4.6 and 7.5.3)

5. When considering the relationship between the likely benefit to the client and the costs to be incurred, it is important to remember in the welfare benefit context that the lack of other remedies combined with the importance of the matter to the client and the long term financial effect of entitlement to a particular benefit may sometimes mean that this test is met even though the financial benefit to the client may well not be great in the short term (e.g. when expressed in terms of weekly income). However, there will be cases where the grant will be refused having regard to other non-judicial remedies (such as obtaining a grant or loan or item of furniture from another source) or where the issue or amount of benefit at stake is relatively trivial. Further, the cost benefit Criterion is unlikely to be met if there is little or no prospect of the decision being changed even if a judicial review is successful.

21.7 Community Care

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1. Proceedings in the community care franchise category are likely to be judicial review proceedings against the local authority or NHS. As such, they will be subject to the judicial review Criteria set out in section 7 of the Funding Code and regard should be had to the guidance contained in section 16 of this guidance.

Administrative Procedures – Criteria 7.2.3 and 7.4.3

2. Investigative Help or Full Representation may be refused if there are administrative appeals or other procedures which should be pursued before proceedings are considered. In community care cases, an application is likely to be refused where there are other remedies available which should be pursued before proceedings are considered, having regard to the circumstances of the client's case and the relevant factors such as urgency. Other remedies may include in community care cases, an application to the relevant NHS facility or Health Services Commissioner and in Local Authority cases, would include the Local Authority complaints procedures. An application should not be refused if a cogent explanation is given as to why pursuing another remedy before bringing proceedings is not appropriate (e.g. because of urgency or it will not provide the appropriate remedy). In any event, where judicial review proceedings are contemplated, there should usually be a letter before action showing that the appropriate authority has been given the opportunity to respond to the matter.

Prospects of Success – Criterion 7.4.5

3. This Criterion is likely to be satisfied if a legal ground is evident, for example:

- (a) it was not a lawful assessment (e.g. not all needs were considered);
- (b) the correct people were not involved in the assessment (e.g. the Housing Authority);
- (c) the Local Authority claimed that it had insufficient money to complete the assessment, such a claim is unlawful as Local Authorities are under a duty to assess once a request has been made.

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21.8 Proceedings under the Prevention of Terrorism Act 2005

1. While not a specific category of funding, these proceedings are subject to their own procedures and criteria. All proceedings under the Act are in scope of civil funding, subject to the normal CLS criteria for scope and merits. As with other proceedings in which the client may be subject to orders or penalties that are (or which the client is reasonably contending are) criminal penalties within the meaning of article 6 of the European Convention on Human Rights, these proceedings are subject to the “interests of justice” test set out in section 7 of this Guidance.
2. Applications for funding in respect of these proceedings are not subject to the means test. The Community Legal Service (Financial) (Amendment No. 2) Regulations 2005 (SI 2005 no. 1097) inserted these proceedings, as paragraph (i), into regulation 3(1) of the financial regulations that sets out those services that are available without recourse to the client’s means.
3. All applications for funding, or notifications of grant of emergency funding under devolved powers should be sent to the Special Cases Unit at Exchange Tower, 2 Harbour Exchange Square, London E14 9GE or DX 170 Chancery Lane. Where an application relates to a case where the anticipated costs to the end of the case are likely to exceed £25,000 the solicitors will be required to provide a case plan for the future conduct of the case and enter a contract with the Commission.
4. Note the Security Council, pursuant to United Nations Security Council Resolution 1390, maintains a list of individuals suspected of being linked to Al-Qa’ida or the Taliban. Where an application is being made on behalf of a client who is on this list, the Al-Qa’ida and Taliban (United Nations Measures) Order 2002 (No.111) provides that it is an offence to make funds available to people on that list without authorisation. Therefore, any individual on the list is prevented from receiving any form of legal aid (including Legal Help and emergency representation) without first obtaining the necessary authorisation. In the United Kingdom, HM Treasury is the authorising authority. It is the applicant’s responsibility to obtain such an authorisation in order that funding can be made available to them. For further information as to the procedures for obtaining a licence applicants should contact the International Financial Services Team at HM Treasury, 1 Horse Guards Road, London SW1A 2HQ, tel: 020 7270 5550.