Case Focus: Special Education Needs

Romy wins right to choose the best school for her needs

For full story please continue to page 4 ...
At Fieldfisher we have a team of specialist lawyers dedicated to acting for adults and children with acquired brain injury. The children we act for invariably have complex educational needs which are sometimes not met by the State.

We understand the difficulties families frequently face in accessing decent education provision. We pursue claims as quickly as proper investigation allows, with minimal disruption to our clients’ lives. We encourage our clients to rebuild their lives while we focus on the legal process.

To fulfil this goal we make considerable efforts to secure interim payments during the case and will advise on options in respect of education needs. Money on account can provide for much needed rehabilitation, care and therapies, appropriate accommodation and assistive technology as well as education provision.

We are one of the UK’s leading personal injury and medical negligence law firms and have a wealth of experience in acting for clients with specialist education needs and who often require lifetime care.

We are compassionate and tenacious. You will see from the cases in this education issue, the different circumstances that our clients encounter.

You only have to read the quotes from our clients and from the independent legal directories to know that we are dedicated to winning the settlements that our clients deserve.

Please take the time to read on and find out what we can achieve together.

You can call us on freephone 0800 358 3848. We would be happy to speak to you about your legal claim and provide further information on the claims process.

I hope you find this newsletter interesting and informative.

Paul McNeil
Head of Medical Negligence & Personal Injury

The group is praised for its commitment to “demystifying the legal process,” while this is a firm for which “client care has always been a priority.” Market sources also regard its conduct as “excellent: very personable and professional, experienced and compassionate.”

Chambers UK, 2013
Edwina Rawson recovered damages for Lara who sustained a brain injury during her birth. When she was born, Lara had no heartbeat and was not breathing.

The resuscitation process was carried out inadequately and Lara did not take her first breath for 13 minutes.

The inadequate care led to oxygen deprivation, which caused Lara catastrophic brain damage.

Lara has cerebral palsy which was caused by both the delay in her delivery and the delay in resuscitation.

Lara will never be able to live an independent life and will require physical, speech and psychological therapies, along with a specially adapted home. She will never be able to work.

Edwina negotiated a settlement of £7.3 million (inclusive of interim sum, lump sum and periodical payments) to provide for the care, schooling and treatment that Lara will require throughout her life. The case was funded by legal aid.

At the time of settlement, there was some uncertainty about Lara’s claim for education costs and we reserved the right to go back to the defendant in due course.

The educational psychologist involved in the case had advised that the local education authority would probably continue to fund Lara’s school fees in the future.

However, it was unlikely that they would pay for her to board at school or for her to attend college between the ages of about 18-21, and a further £200,000 compensation was paid for this.

This was endorsed by the Court of Protection as an appropriate award. Accordingly, the final settlement was £7.5 million.

After the case Lara’s parents said: “We shall always think of Edwina as our daughter’s ‘fairy godmother’ as she was simply brilliant. Our daughter now attends a fantastic school, which is enhancing her potential and making a real difference. This would just not have been possible without Edwina’s help and we are eternally grateful.”

“Our daughter now attends a fantastic school which is enhancing her potential and making a real difference.”

Opening paragraph of the document: Approved solicitors

We are recommended by the brain injury charity Headway on its list of approved solicitors. We are also on the approved lawyers list for the UK Acquired Brain Injury Forum (UKABIF), a charity that promotes the understanding of all aspects of acquired brain injury.

We have close links with and fundraise for the Child Brain Injury Trust and AvMA (Action against Medical Accidents), a charity promoting patient safety and justice.

Our approach

As a team we are renowned for our expertise, commitment to our cases and the care that we take.

“Paul McNeil is totally unflappable; whenever clients get in a bit of a tizz, he restores their confidence.”

Chambers UK

Caring for our clients

Our clients come first. We are committed to pursuing your claim as quickly as proper investigation allows. We appreciate the difficulties that are often faced by people with acquired brain injury.

For us, each case is unique. The care, commitment and expertise of our lawyers ensures we will get you the best possible award.

Rehabilitation

Rehabilitation is one of the important issues your lawyer will address. Our aim is to encourage our clients to rebuild their lives while we focus on the legal process.

We want to take the pressure off you and your family and ensure that we get the resources to fund your rehabilitation, housing, care and educational needs, now and in the future.

Interim payments

If you have a claim where liability is not in dispute we will do all that we can to secure an interim payment at an early stage.

We want to ensure that proper care and support is available during the course of the litigation rather than waiting to recover a large sum of money at the end of the claim.

This can make provision for much needed rehabilitation, care, therapies, education needs, assistive technology and appropriate accommodation. Many of our clients or their families rely on the funds we obtain to replace lost income.

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UK & abroad

We pursue brain injury claims for people who live all over the UK and abroad.

We will visit you at home or at hospital, wherever you live. We don’t expect you to come to our offices.

Legal claims

www.fieldfisher.com/personalinjury | Freephone 0800 358 3848
Our client, who was injured in a car accident, is now receiving the best education possible

Virta suffered severe brain damage after being injured in a road traffic crash. The case had been pursued by a previous firm of solicitors for 12 years but they had not brought it to a successful conclusion.

Jill Greenfield took over the case. It quickly became clear that the school Virta was attending did not appear to meet her complex needs. The indication was that she required a highly structured and consistent environment. This would provide her with a wide based curriculum including the development of independence and self-care skills.

Our educational expert and rehabilitation experts felt that Virta needed to be placed in a school that provided her with a higher level of integrated therapy with an extended curriculum to manage some of her frustrations and unpredictable behaviour in both the classroom and the social setting.

However before we took over the case it was discovered that an agreement had been entered into with the defendants that prevented Virta from moving to another school.

The agreement also said that no move to a different school could happen until a High Court hearing took place in relation to the education needs. This was effectively an injunction preventing Virta moving to a school which our experts felt would better meet her individual needs.

We felt that this was a tactic being used by the defendant to avoid paying the cost of specialist school fees. Jill challenged the agreement that had been entered into. The defendant initially refused to change position. We continued to press for Virta’s right to choose which school she attended. On the day before the education case was due to go to trial, the defendant agreed to the Court Order preventing Virta from changing schools to be lifted.

We also secured an interim payment of £50,000 from the defendant. This money enabled Virta to move to a school which could better meet her needs.

This was a boarding school and would ensure that therapy and teaching would be well integrated into the waking curriculum and that the therapists would work within the school and then follow that through to the community setting.

Virta is now going from strength to strength. The indication is that she is making excellent progress and is very happy in her new school.

In addition, in just over a year from instruction, we were able to achieve settlement of the personal injury claim. Virta received a sum worth in excess of £5 million to ensure her continuing care and support, now and in the future.

“I would like to congratulate you and your team for such a speedy and favourable outcome. It has been great knowing you as a person and a professional.”

Virta’s parents
Romy successfully claimed for compensation against the Lister Hospital in Stevenage for the injuries she sustained a few days after her birth when she was a patient in the Special Care Baby Unit.

Romy was over-infused with dextrose. This caused a perfusion injury to her brain and resulted in severe learning difficulties including Autistic Spectrum Disorder.

At the time of the High Court trial, Romy was being educated at a state-funded special needs primary school in Hertfordshire. All the experts agreed that this was very likely to be unsuitable for her future needs. Romy’s parents objected to the proposed named school in the statement and wished to appeal to the Special Educational Needs and Disability Tribunal (SENDT).

At the trial, Mr Justice Penry-Davey awarded damages to Romy to allow her to appeal the statement and he adjourned the issue of her claim for the cost of future education in the following terms:

“Mr & Mrs Smith want the Claimant to attend Radlett Lodge School but the issue of funding is unlikely to be resolved before the outcome of two Tribunal Appeals... Because there are potentially large sums involved in my Judgement it is appropriate that I give liberty to the Claimant to apply for a future trial on the issue of damages for school, care and therapy fees to the age of 19 in the event of an appropriate Education Authority failing to meet the expenses of the appropriate school.”

In the event, Romy’s appeal to the SENDT was not successful. As a result it was necessary for Fieldfisher to seek to compel the Hospital Trust to pay the substantial costs of the Radlett Lodge School which has a pre-eminent reputation for successfully educating children with Autistic Spectrum Disorder. Indeed, by the time of the hearing Romy had started at the school and both Romy and her parents were extremely happy with the progress she was making.

A few days before the Education Hearing, the defendants agreed to pay for Romy’s education at the Radlett School. The past fees and expenses were paid by way of a lump sum and the future costs were paid by way of an Annual Payment Order which took account of future increases in school fees.

After the case Paul McNeil said: “In many ways Romy’s case was novel. But in my view the principle is that she is entitled to opt for self-funding (and therefore choosing the best school for her needs) in preference to reliance on the statutory obligations of the Education Authority. This is particularly important when spending cuts are clearly affecting the public provision of education to those with cognitive, behavioural or physical disabilities who most need it.”

Case Study
Caring for our clients  Commitment to our cases  Cutting edge expertise

Romy wins right to choose the best school for her needs

Payment of the school fees provides the best education for Romy

www.fieldfisher.com/personalinjury  Freephone 0800 358 3848
Causation
We must prove that your injury was caused, or materially contributed to, by the breach of duty.

Once we have established breach of duty of care and causation, we will be able to quantify your claim, that is, establish how much damages you should receive.

Damages can be claimed for pain and suffering and financial losses.

Are there time limits?
Court proceedings are not always necessary. If they are, we aim to start them as soon as possible.

You have three years from the date of the negligence to formally instigate proceedings. The court has power to override the three-year limitation period but this is rare.

With children and people under a disability (i.e. those who are incapable of managing their own affairs), the rules are different. The three-year period does not start to run until the child’s 18th birthday or until the person ceases to be under a disability. That said, it is still very important to see a solicitor as soon after the event as possible, whilst memories are fresh.

Complex claims
Most brain injury claims are very complex and may take a number of years to complete. We will need to properly assess the effect of the brain injury in order to ensure you receive adequate compensation.

If you need treatment, care or rehabilitation in the short term, we will make sure that you receive an interim payment to access any specialist services that you need, wherever possible.

Funding
We know legal costs can be a real concern when you are considering bringing a claim. There are several options available to you. Once we have more information about your circumstances, we will advise you as to the best method of funding available to you.

Negligence
To pursue a successful claim, we need to establish that there has been a breach of the duty of care owed to you. We must be able to show that, for example, the car driver or doctor made a mistake that was negligent.

Breach of duty
The facts of each case must be examined carefully. We have wide experience in investigating all types of accidents to ascertain whether someone was at fault.

Establishing breach of duty of care can be difficult. Generally it is necessary to get independent expert evidence on this issue.

Samantha Critchley, partner, explains how we conduct personal injury and medical negligence claims.

Pursuing a claim can be daunting. We have the necessary knowledge of both law and medicine to handle even the most complex of cases. Here is a brief overview of the key steps involved.
In March 2011 the government published the Green Paper: “Support and aspiration: a new approach to special educational needs and disability” which contained wide-ranging proposals to respond to criticisms of the present system of provision for SEN needs.

There followed a very long consultation period including trials of the scheme by 20 “Pathfinders” who tested the core proposals from the paper in order to feed back their results to the government (results still pending).

The Children and Families Bill was published on 5 February 2013 and is expected to become law in September 2014.

The new legislation is intended to allow children, young people and their parents greater control and choice in decisions and ensuring needs are properly met.

The main tools for achieving these goals are as follows:

- replacing old Statements with a new birth-to-25 Education, Health and Care Plan (EHC Plan);
- offering families personal budgets; and
- improving cooperation between all the services that support children and their families, particularly requiring local authorities and health authorities to work together.

Whilst the Bill as currently drafted provides some additional benefits for children with SEN, there are serious concerns that some provisions will reduce the rights of children.

Some Good Points

- The extension of the scheme to include young people up to 25 years of age engaged in education/training as opposed to the current 19 years.
- Academies will be subject to the same direct legal duties to children with EHC plans as state schools.
- The duty to admit a child has been extended to include non-maintained special schools and approved independent special schools where the Local Authority has named it in an EHC plan.
- Children will be given the right of appeal to the SEND Tribunal against a Local Authority decision about their SEN. Currently only parents are able to exercise this right.
Potential Problems

**Education Health and Care Plans**

- Local Authority duties and obligations only extend to educational needs. SEND Tribunals will decide only disputes about education and not the health and care parts of the plan. There is no one single way or place to challenge all of the content of the EHC plan.

- There is no duty to assess a child for the health or care aspects of the Plan. The Local Authority decides what they think is appropriate to put in an EHC plan but cannot be compelled to provide either the health or care support to the child.

- Parents can use the NHS Complaints system if they are unhappy with the level of healthcare provided at school but this can be slow and redress is at the discretion of the NHS Trust.

**Limited rights to educational provision for children with SEN but without an EHC Plan**

- Abolition of “School Action” and “School Action Plus” which will leave provision for the majority of children with SEN unregulated. Replaced with Additional SEN Support (ASS).

- ASS is not obliged to provide parents with information about how significant their child’s learning difficulties are, what support will be put into place and whether outside help is needed. There will be no requirement for consistent record keeping which will make it difficult to assess how schools have responded to individual SEN and whether statutory assessment is required.

**Personal budgets/direct payments**

- There are still no details as to how Personal Budgets/Direct Payments will be calculated or what provision they can be used for.

- It is not clear whether the level of payments can be challenged where they relate to Special Educational Provision.

**Disabled children without SEN may not be entitled to an EHC Plan**

- The EHC plans may not extend to disabled children who have only health and/or social care needs, notwithstanding that they require this support in an educational setting.

**Lack of evidence**

- Data from the Pathfinders Schemes which have been trialling the suggested changes to SEN Provision is not expected to be reported to Government until September 2014 – the current date for implementation of the Children and Families Bill.
Some Concerns

**Therapies as special educational provision**

> Definition of Special Educational Needs provision will mean only that which is made “wholly or mainly for the purposes of ... education or training.” Speech and language, occupational and physiotherapy provision and potentially mental health support services may not fall within the new definition whereas previously they were considered to be within the ambit of SEN provision.

> If therapies are excluded from the SEN definition, parents will be unable to challenge the Local Authority for failure to provide them.

**Reassessment of needs**

> When a child’s needs change, the Local Authority will no longer have to perform a comprehensive assessment of those needs with the involvement of relevant education professionals, Educational Psychologists, social services and health services. Instead, Local Authorities will be able to choose the format of reassessment without obtaining evidence from the relevant professionals. They can choose to only review a specific area of the EHC plan.

> In practice, this means that the Local Authority would not have a duty to conclude the process formally which triggers the right of appeal to the SEND Tribunal. Parents may be left in a position where they are unable to challenge the provision for their child in situations where their needs have changed.

**Annual Review rights**

> There will no longer be a duty on Local Authorities to inform parents, children or young people of the outcome of the Annual Review of an EHC plan. Until the decision is communicated it cannot be appealed to the SEND Tribunal.

> Local Authorities will no longer be obliged to enable parents to participate in decision-making or to ensure that relevant professionals attend review meetings at key stages of a child’s education.

**Time limit by which to decide whether to issue a EHC Plan**

> Presently a Local Authority is obliged to make a decision about whether to issue a Statement within 2 weeks of assessment. A decision not to do so triggers a right of appeal to the SEND Tribunal if parents disagree.

> The draft Regulations do not impose a time limit by which a decision not to issue a EHC plan must be made. This could leave children and their parents in limbo and without a clear path to appeal.

Continue to next page ......
EHC Plans will not have a standard form, clearly setting out legally enforceable provision

> All Statements, regardless of who issues them, are in a standard format as currently detailed in the SEN regulations. However, the Bill no longer requires a standard form for EHC Plans. If Local Authorities are able to issue their own plans there could be confusion over the boundary between educational and health provision. This could lead to confusion over what is legally enforceable and potential problems in children transferring from one authority to another, given the local nature of these Plans.

Proactive duty to assess SEN

> The Local Authority will only have a duty to identify children with SEN, rather than the current more onerous duty of identifying the needs of these children via assessment.

Young person versus parent as responsible person

> Currently a parent is responsible for the education of their child with SEN at school and has the right to participate in all decision-making, to participate in Annual Reviews and to challenge decisions via the SEND Tribunal up until the age of 19 years.

> The Bill provides that these rights are transferred to young people as soon as they reach 16. There seems to be no provision for parents to continue to appeal decisions on behalf of their child unless the child lacks mental capacity.

Our Hopes

Our hopes are that the new reforms will be positive and that:

- the needs of the child will remain paramount;
- the new system is clear, transparent and easy to navigate; that it supports parents;
- there is a recognition that most parents have the best understanding of what their child’s needs are;
- the system is timely, will allow for early interventions with less red tape, whilst also being thorough and robust.

Time will tell.
Meet the team

Paul McNeil
Partner
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020 7861 4019

Paul heads the personal injury and medical negligence department and has specialised in claiming on behalf of victims for over 20 years. He is a member of both the Law Society and AvMA clinical negligence panels. He is responsible for High Court Users group and frequently writes and lectures on the subject.

Samantha Critchley
Partner
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020 7861 4263

Samantha has over a decade of experience acting for claimants in medical negligence claims. She has expertise in acquired brain injury cases involving adults and children. Samantha is on the AvMA clinical negligence panel and is a member of the Association of Personal Injury Lawyers (APIL).

Jill Greenfield
Partner
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020 7861 4557

Jill has 20 years’ experience acting for claimants and is head of our brain injury and spinal injury unit. Jill is recognised by Headway (the brain injury association), SIA (Spinal Injuries Association) and various legal directories as a leading lawyer and specialist in dealing with such claims.

Edwina Rawson
Partner
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020 7861 4105

Edwina is a partner in our medical negligence team. She is on the Law Society’s clinical negligence panel and is a member of the Association of Personal Injury Lawyers (APIL). Edwina gives regular presentations to AvMA and APIL.

Mark Bowman
Partner
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020 7861 4043

Mark pursues cases on behalf of victims of medical negligence. A member of the Law Society clinical negligence panel, Mark is also a senior litigator at the Association of Personal Injury Lawyers (APIL).

Richard Earle
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Richard specialises in medical negligence claims and is a member of AvMA and the Law Society’s clinical negligence panel.

Jonathan Zimmern
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020 7861 4218

A barrister, Jonathan acts for those injured through negligence or accidents. Jonathan is a member of the Association of Personal Injury Lawyers (APIL) and a volunteer on the AvMA helpline.

Manori Wellington
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020 7861 4385

Manori Wellington has specialised in claimant medical negligence claims for over 15 years. She is a member of both the AvMA and Law Society clinical negligence panels. She has recently joined the Fieldfisher medical negligence claims team.

Alice Ketteringham
Solicitor
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020 7861 4553

Alice Ketteringham is a Solicitor in the Industrial Disease Department. Alice worked as a Paralegal in the department before completing her training at the firm, and qualified into the department in September 2013. She specialises in cases arising out of asbestos related diseases including mesothelioma, asbestosis, lung cancer and pleural thickening.

Jennifer Bradley
Solicitor
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Jenny qualified into our personal injury and medical negligence department having trained at the firm. Jenny has a varied caseload and also assists Jill Greenfield with complex and high value cases.

Fieldfisher maintains its outstanding reputation in the market. The team provides a ‘first-class’ service at all levels of experience.

The Legal 500, 2012
Useful organisations

Action for kids
www.actionforkids.org
Works with children and young people with physical and learning disabilities

Advisory Centre for Education
www.ace-ed.org.uk
Advice for parents/carers or children in state-funded schools who are experiencing difficulties

AvMA
www.avma.org.uk
Action against Medical Accidents - The charity for patient safety and justice

Brainwave
www.brainwave.org.uk
Delivers home-based therapies and exercises to support disabled children

Brain Injury Rehabilitation and Development (BIRD)
www.b-i-r-d.org.uk

Brake - the road safety charity
Tel: 01484 559909
Helpline: 0845 603 8570
Email: helpline@brake.org.uk
Website: www.brake.org.uk

British Association for Early Childhood Education
www.early-education.org.uk
Support, advice and information for those concerned with the education and care of young children

Centre for Studies on Inclusive Education (CSIE)
www.csie.org.uk
Supports inclusive education as a human right of every child

Child Brain Injury Trust
www.childbraininjurytrust.org.uk

Disability Law Service
www.dls.org.uk

Headway - the brain injury association
www.headway.org.uk

National Association for Special Educational Needs (NASEN)
www.nasen.org.uk
Promotes the education, training and advancement of all those with special needs

National Institute of Conductive Education
www.conductive-education.org.uk
Conductive Education to improve the lives of those with neurological disorders

Scope
www.scope.org.uk/education
Scope offers disabled people education and learning opportunities

Special Needs Kids
www.special-needs-kids.co.uk

Special Needs Family Fun
www.family-friendly-fun.com
Support for the family with special needs

The March Foundation
www.marchfoundation.co.uk
Supports children with special educational needs to reach their full potential

The United Kingdom of Acquired Brain Injury Forum
www.ukabif.org.uk

Whizz-Kidz
www.whizz-kidz.org.uk
Mobility equipment, opportunities to meet and training for disabled children

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