

# Social Care and the SEND reforms

## Advice on frequently asked questions



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# Introduction

This advice has been prepared by Barrister Steve Broach from Monckton Chambers. It sets out a number of frequently asked questions that have arisen through the Council for Disabled Children's transforming culture and practice in children's social care assessment programme as well as feedback from our Social Care training.

## Foreword

I am asked to advise the Council for Disabled Children (CDC) on certain 'frequently asked questions' relating to social care and disabled children in the context of the 'SEND reforms', in other words the reforms introduced by Part 3 of the Children and Families Act (CFA) 2014.

The questions I am asked are each set out in full below as presented to me, save for minor editing for clarity. Given the very limited information I have for each scenario my advice is necessarily in general terms. Nothing said in my response to each of the questions should be used to determine the appropriate course of action in any particular case. In this area the legal requirements are very closely related to the facts of each case and case-specific advice will need to be sought. With that caveat I hope that my responses to these questions provides useful general information and supports understanding of some of the complex issues involved with implementing the SEND reforms for CDC and those they work with.

If I can provide any further advice on any of these matters please contact me in chambers.

**Steve Broach**  
**12 February 2016**

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## How do you balance the rights of 16 year olds under the Children and Families Act 2014 with care planning responsibilities up to 18 under the Children Act 1989?

1. I do not see any conflict here:
  - a. As the question correctly identifies, the scheme under the Children Act 1989 requires a child 'in need' plan to be maintained until a child is 18 – or indeed beyond following the amendments relating to the transition to adult social care.<sup>1</sup> Furthermore 'looked after' children will benefit from the 'pathway planning' obligations inserted by the Children (Leaving Care) Act 2000, potentially until their 25th birthday.
  - b. Under the Mental Capacity Act (MCA) 2005, there is a presumption that all young people over the age of 16 can make decisions for themselves. This presumption can be rebutted by evidence that the young person is not capable of making the relevant decision at the relevant time.
  - c. This means that care planning for those aged 16 or over needs to be done in accordance with the letter and spirit of the MCA 2005. Those young people capable of deciding on their care and support needs should be permitted and encouraged to do so. Those who lack capacity to make some or all of these decisions should be supported to be involved in decisions to the greatest possible extent and their wishes and feelings should be given significant priority in 'best interests' decisions taken for them.
  - d. The only change made under the CFA 2014 is that for decisions taken under Part 3 of the CFA a 'representative'<sup>2</sup> or parent can continue to make decisions on the young person's behalf, if they lack capacity to decide for themselves<sup>3</sup>. This avoids the need for a 'best interests' decision to be made<sup>4</sup> and gives the representative/parent the same powers as if the young person was under 16. In other words they could agree a care plan on behalf of the young person, but could not require any particular service to go in the plan – any more than a parent of a younger child could do so.
  - e. The different approach outlined above only applies to decisions taken under Part 3 of the CFA. This may give rise to questions about whether the relevant decision is being taken under the CFA – for example, care planning in the context of an EHC Plan is plainly a decision under the CFA, but this is not so clear in relation to a stand-alone child in need plan (or care and support plan under the Care Act 2014). As such if issues arise as to a young person's decision making capacity legal advice may need to be sought on the facts of a particular case – as to whether the parent continues to have decision making rights and responsibilities or if the 'best interests' approach is required.

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1 See sections 17ZG-ZI of the Children Act 1989, inserted by section 50 of the CFA 2014 and section 66 of the Care Act 2014.

2 Normally a Deputy appointed by the Court of Protection, but also potentially a person with Lasting Power of Attorney.

3 See section 80 of the CFA and Part 6 of the SEN and Disability Regulations 2014.

4 Although the scheme of course expects the parent to act in the young person's best interests. If it is arguable that they are not, the local authority or other public body may need to consider making an application to the Court of Protection, for which case-specific advice should be sought.

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- f. It is also important to bear in the mind the requirement, not least under Article 12 of the UN Convention on the Rights of the Child, that younger disabled children should be involved in all decisions taken about them and that children under 16 who are 'Gillick competent' should be allowed to take decisions for themselves. Further guidance on these issues is provided in chapter 7 of the second edition of Disabled Children: A Legal Handbook (Legal Action Group).

## **How should Independent Reviewing Officers (IRO)/social workers challenge EHC plans if they do not feel it is meeting the needs of the child or young person?**

1. Firstly, it is essential that IROs and social workers do challenge inappropriate EHC plans.
2. In terms of the process, the formal mechanisms will be:
  - a. A complaint under the local authority complaints process, which should be brought by the affected family with the support of the IRO/social worker; or
  - b. An appeal to the Tribunal against the contents of the EHC plan, which again would need to be brought by the affected family with support.
3. Where an EHC plan is in place which is not meeting a child's, or young person's, needs there should be an urgent review of the plan and potentially a request for a re-assessment if the issue is that the child or young person's needs have changed.
4. It is also important to bear in mind that the social care assessment and planning duties run alongside the EHC assessment and planning duties. As such if the EHC plan is not meeting a child or young person's social care needs and it is not practically possible to address this there is nothing to prevent children's or adult's social care services from completing a (re)assessment or care plan review and then putting in place a fresh plan to meet those needs. It is however essential that as far as possible children and young people's needs are addressed in a joined-up way, which is not promoted by having separate planning processes.

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**Can a professional that is not a social worker (e.g. a social work assistant/field support officer, perhaps within early assessment teams) complete reviews/assessments for needs provided under the CSDPA? Or, in other words, does an assessment to provide for the list of supports under the CSDPA have to be completed by a social worker?**

1. There is nothing in the Chronically Sick and Disabled Persons Act 1970 which says that assessments need to be carried out by any particular kind of professional – indeed there is no express assessment duty under the 1970 Act at all.
2. Assessments for children under the 1970 Act are carried out under section 17 of the Children Act 1989.<sup>5</sup> The Working Together 2015 statutory guidance states (p18) in relation to these child ‘in need’ assessments that ‘Where an assessment takes place, it will be carried out by a social worker’.
3. However this statutory guidance can be departed from where there is a considered decision that there is good reason to do so; see R (TG) v Lambeth LBC [2011] EWCA Civ 526 at [17]. In R (L and P) v Warwickshire County Council [2015] EWHC 203 (Admin) (‘Warwickshire’), the Judge (referring to the previous version of Working Together) said at [72] that ‘In my judgment the guidance should not be read as insisting that every disabled child should initially be the subject of a full-blown social worker assessment. Alternatively, if it does say that then local authorities and safeguarding boards would have good reason for departing there from.’
4. As such, the situation would appear to be that although the statutory guidance strongly indicates that assessments of disabled children should be carried out by social workers, a local authority may have a good reason not to follow this and instead to require assessments to be carried out by other appropriate persons. There is no guarantee however that a different judge considering different facts would take the same approach as the Judge in the Warwickshire case. It is also relevant that the 2015 version of Working Together may be read as imposing a stronger requirement that assessments should be carried out by social workers than the 2013 version considered in the Warwickshire case.
5. What must matter most however is that the person carrying out the assessment has the appropriate skills and expertise to analyse and evaluate the child’s needs in their family context. It may be thought that this is more important than whether the assessor is a qualified social worker. This focus on assessors having the appropriate skills and experience mirrors the approach taken under the Care Act 2014 in relation to assessments of disabled adults<sup>6</sup>.

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5 This has always been the case since the Children Act 1989 came into force, but has been made clearer by the new language of section 2(4) of the CSDPA.

6 See regulation 5 of the Care and Support (Assessment) Regulations 2014; ‘A local authority must ensure that any person...carrying out an assessment (a) has the skills, knowledge and competence to carry out the assessment in question; and (b) is appropriately trained.’

6. In the context of the CSDPA, the purpose of the assessment is to allow the local authority to determine rationally and reasonably whether it is 'necessary' to provide the child with one or more of the listed types of service in section 2(6) – this then triggering a duty to provide a level of such service that is sufficient to meet the child's needs. Whoever carries it out, the assessment must be of sufficient quality and depth that this question can be properly answered, including consideration of the wider family context.
7. For more guidance on the implications of the Warwickshire judgment for social care assessments of disabled children, see the briefing paper produced by CDC<sup>7</sup>.

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<sup>7</sup> CDC case law update 4 – December 2015; The Warwickshire judgment – implications for social care related assessments of disabled children, available at [http://www.councilfordisabledchildren.org.uk/media/1083672/case-law-update-4\\_warwickshire-assessment\\_dec-15.pdf](http://www.councilfordisabledchildren.org.uk/media/1083672/case-law-update-4_warwickshire-assessment_dec-15.pdf)

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**If a child or young person is assessed as part of a social work assessment as needing a specific service and the provision is made under s 17 or CSDPA, but the case is then stepped down to Universal Provision or Early Help, does the provision/plan need to be reviewed under the statutory framework?**

1. It is difficult to see how a service can be provided to a disabled child after a social work assessment otherwise than under section 17 of the Children Act 1989<sup>8</sup>. The child will remain 'in need', as all 'disabled' children are children 'in need', see section 17(10)(c) and (11).
2. If the child is not accessing any kind of specialist service and is only accessing universal provision then it may be said that there has been a decision that it is not necessary to provide services to the child and so no child 'in need' plan needs to be maintained. This is supported by Working Together 2015, which states:
  - a. 'Where the local authority children's social care decides to provide services, a multi agency child in need plan should be developed which sets out which agencies will provide which services to the child and family' (p33, emphasis added).
  - b. Where the outcome of the assessment is continued local authority children's social care involvement, the social worker and their manager should agree a plan of action with other professionals and discuss this with the child and their family' (p25, para 53).
3. However where the child is receiving any kind of specialist input and/or where there is continued social care involvement, it would seem to me likely that a child in need plan would continue to be needed and there would need to be ongoing reviews, which the guidance says should take place 'regularly' (p25, para 55). Any other approach would be a departure from the guidance which would need to be justified if challenged.

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<sup>8</sup> For children, the CSDPA 1970 duty is discharged by the local authority exercising its Children Act 1989 functions, see section 2(4).

**When asked for advice as part of the EHC Assessment, if a child or young person has previously had an allocated Social Worker but the case has since been closed, how much information should workers be providing about historical involvement – for example in relation to child protection concerns?**

1. The overriding principle here is proportionality – meaning in essence that information should only be provided to the extent necessary to meet the purpose for which advice is sought<sup>9</sup>. To identify whether including historic information (for example in relation to child protection concerns) as part of the advice, it is necessary to consider carefully the purpose for which the advice is sought.

2. The SEND Code of Practice states at para 9.46 that

‘The local authority must gather advice from relevant professionals about the child or young person’s education, health and care needs, desired outcomes and special educational, health and care provision that may be required to meet identified needs and achieve desired outcomes’.

3. The Code of Practice at para 9.49 describes the required social care advice as follows:

‘Social care advice and information from or on behalf of the local authority, including, if appropriate, children in need or child protection assessments, information from a looked after child’s care plan, or adult social care assessments for young people over 18. In some cases, a child or young person may already have a statutory child in need or child protection plan, or an adult social care plan, from which information should be drawn for the EHC needs assessment.’

4. The Code of Practice expressly refers to the provision of child protection documents as part of the social care advice – but identifies (rightly in my view) that this information should only be provided ‘if appropriate’.

5. Therefore in responding to a request for advice, social workers will need to consider whether the information is relevant to:

- a. The child or young person’s education or health needs;
- b. Their desired outcomes; and
- c. Special education, health and care provision that may be required in the light of the above.

<sup>9</sup> A proportionate approach is required, amongst other reasons, because the provision of this information as part of the social care advice is likely to engage Article 8 ECHR, the right to respect for private and family life. It should also ensure compliance with the Data Protection Act 1998.

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4. It may well be the case that information about historical involvement is relevant to the child or young person's current education, health or care needs, desired outcomes or required education, health or care provision. Equally, the information may not be relevant. While there is no hard or fast rule, it may be thought that the more time that has elapsed, the less likely historical information is to be relevant now.
  5. Even if the information remains relevant, the second question is whether it is proportionate to include it as part of the advice – in essence, does the benefit of including this information outweigh any negative consequences, particularly for the child or young person?
  6. This is an extremely important and sensitive issue and if social workers are in any doubt then case specific legal advice should be sought. Practitioners should also consult the HM Government advice on information sharing<sup>10</sup>, paying attention in particular to the 'seven golden rules' and the principles it sets out at 8-9. There is also a useful flowchart on p12. The guidance states in summary (p7) that:

'Whilst the Data Protection Act 1998 places duties on organisations and individuals to process personal information fairly and lawfully, it is not a barrier to sharing information where the failure to do so would result in a child or vulnerable adult being placed at risk of harm. Similarly, human rights concerns, such as respecting the right to a private and family life would not prevent sharing where there are real safeguarding concerns.'
  7. More in-depth guidance is available from the Data Sharing Code of Practice produced by the Information Commissioner's Office<sup>11</sup>. Following this Code of Practice will, in particular, help ensure compliance with the Data Protection Act 1998.

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<sup>10</sup> HM Government, Information sharing: Advice for practitioners providing safeguarding services to children, young people, parents and carers, March 2015, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419628/Information\\_sharing\\_advice\\_safeguarding\\_practitioners.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419628/Information_sharing_advice_safeguarding_practitioners.pdf)

<sup>11</sup> Available at <https://ico.org.uk/for-organisations/guide-to-data-protection/data-sharing/>

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**In EHC planning, should information about provision that meets social care needs that are either available as part of the local offer, Universal services or are paid for by the family be included in the H1 section (e.g. activities such as Beavers or swimming)?**

1. In answering this question, it is first necessary to consider what the Code of Practice says about sections H1 and H2 in an EHC plan.
2. Section H1 must include 'Any social care provision which must be made for a child or young person under 18 resulting from section 2 of the Chronically Sick and Disabled Persons Act 1970'. As such:
  - a. It is unlikely that universal services will need to be included in section H1, unless the child needs additional support to access these services as that support might be a CSDPA service.
  - b. Services available as part of the local offer may need to be included in section H1, if they are being provided following an assessment which demonstrates this provision to be necessary to meet the child's needs. To go in section H1 it would also be necessary for the service to fit into the CSDPA 'service list', which is summarised in the Code of Practice at p168. For example, a playscheme where the child accesses short breaks with additional support may fall into the category of 'assistance in obtaining recreational facilities outside the home' under the CSDPA and if so this provision should go in section H1.
  - c. Services paid for by the family should not be included in section H1, as this is not provision which the local authority accepts it is necessary for it to provide or fund. The only exception would be if the local authority were charging the family for the cost of the service pursuant to the power in section 29 of the Children Act 1989, but this is rarely used. If the provision needs to be made under section 2 of the CSDPA 1970 then this should be paid for by the local authority, not the family.
4. Section H2 must include 'Any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN'. As such:
  - a. Any additional support required to access universal services should go in section H2, unless the local authority accepts that it is under a duty to provide this support pursuant to the CSDPA in which case it should go in section H1. However a universal service itself (such as Beavers or swimming) is not a 'social care service' which would need to be included in the plan.
  - b. Services available as part of the local offer are likely to need to be included in section H2, unless again they are being provided pursuant to the CSDPA duty in which case they should go in section H1.

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- c. Services paid for by the family are not a 'social care service', again unless the family are being charged pursuant to the Children Act charging powers (which are rarely used). As such these services should not generally go in the plan, subject to the exception below.
  - d. Any mainstream service or support for the child which the local authority considers is meeting a social care need (in other words a social care service may be required if the mainstream service was not available) could in my view reasonably be included in section H2. This will ensure that the EHC Plan properly reflects the actual level of service and support the child is receiving, which aids transparency.

### **Do we have any national data about how many authorities have the social care disability team structurally within SEND or remaining with the rest of social care?**

1. This is a practical question rather than a legal question. However I am not aware of any specific legal requirement as to how local authorities structure their disabled children's teams. What matters is that the structures and processes facilitate rather than hinder effective integration of support, as required by section 25 of the CFA; 'A local authority in England must exercise its functions under this Part with a view to ensuring the integration of educational provision and training provision with health care provision and social care provision...'

## In some local authorities children accommodated under section 20 of the Children Act 1989 and other looked after children are excluded from having personal budgets. What are their rights?

1. I am not aware of any legal basis for denying children accommodated under section 20 or other looked after children a personal budget, which is in essence a statement of the cost to the local authority of securing the provision they need<sup>12</sup>. A policy which denied a benefit like this to looked after children would be inherently discriminatory and the discrimination would in my view be very difficult to justify.
2. It is important to distinguish here between a personal budget and a direct payment. A personal budget can be in three forms (see the Code of Practice at para 9.101):
  - a. A 'notional' budget or 'arrangement' - where the local authority, school or college holds the funds and commissions the required support;
  - b. Third party arrangements – where funds (direct payments) are paid to and managed by an individual or organisation on behalf of the child's parent or the young person; and
  - c. Direct payments - where 'individuals receive the cash to contract, purchase and manage services themselves'.
4. In relation to social care direct payments for children, the relevant statutory guidance<sup>13</sup> makes clear that direct payments can be made to persons with parental responsibility for disabled children and/or to disabled children themselves if they are aged 16 or over<sup>14</sup>.
5. Providing accommodation for a disabled child under section 20 of the Children Act 1989 does not in any way affect the parental responsibility of the child's parent(s), notwithstanding that the child is 'looked after' for the duration of the period of accommodation. As such direct payments should be available to disabled children aged under 16 accommodated under section 20 through their parents as they are for other disabled children. For example, if a child has a 52 week special school placement where it is accepted that they are accommodated under section 20, it may well be appropriate for the local authority to make direct payments to the child's parents to support them to visit the child and take part in activities together at the weekend.

<sup>12</sup> See the Code of Practice at para 9.95; 'A Personal Budget is an amount of money identified by the local authority to deliver provision set out in an EHC plan where the parent or young person is involved in securing that provision'.

<sup>13</sup> Department of Health, Guidance on direct payments for community care, services for carers and children's services: England 2009

<sup>14</sup> See section 17A of the Children Act 1989, inserted by the Health and Social Care Act 2001. Section 17A(2) makes direct payments available (so far as relevant here) to '(a) a person with parental responsibility for a disabled child...or (c) a disabled child aged 16 or 17'.

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6. The position in relation to disabled children aged under 16 who are the subject of a care order is more complex. If the question arises of whether such a child can have a direct payment case-specific legal advice should be sought. However it is important to note that under a care order parental responsibility is shared between the parent and the local authority, so it seems to me there is no barrier to direct payments being made to the parent of a child who is subject to a care order if the local authority considers the other conditions are met, including that it is appropriate for the child's needs to be met in this way. There may of course be good reasons why the local authority considers that it is not appropriate to make direct payments in such cases, but that is a matter of judgment on the facts of each individual case – if necessary informed by case-specific legal advice.

## If young people are receiving services under the Local Offer or short breaks do they have to have a 'child's needs assessment'?

1. A 'child's needs assessment' ('CNA') is the new assessment governing transition to adult social care for disabled children introduced by the Care Act 2014.
2. The right to a CNA is not in any way dependant on what if any services a disabled child might be receiving. The duty to carry out a CNA arises 'where it appears to a local authority that a child is likely to have needs for care and support after becoming 18', subject generally to the child's consent<sup>15</sup>. The timing of the assessment is then determined by the local authority's judgment as to when it would be of 'significant benefit' to the child to carry it out.
3. This is all explained in chapter 16 of the Care and Support Statutory Guidance issued under the Care Act 2014. The guidance emphasises at para 16.10 that the threshold for when a child is 'likely to have needs for care and support after becoming 18' is set low:

'When considering whether the young person or carer is 'likely to have needs' this is intended to reflect any likely appearance of any need for care and support as an adult – not just those needs that will be deemed eligible under the adult statute. It is highly likely that young people and carers who are in receipt of children's services would be 'likely to have needs' in this context, and local authorities should therefore carry out a transition assessment for those who are receiving children's services as they approach adulthood, so that they have information about what to expect when they become an adult'

4. The guidance also stresses at para 16.19 that 'local authorities should consider how they can identify young people who are not receiving children's services who are likely to have care and support needs as an adult'. Again, this emphasises that the duty to carry out a CNA goes well beyond children who may have received any particular kind of children's services or assessed as meeting any children's eligibility criteria.

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<sup>15</sup> Section 58 of the Care Act 2014

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## Do DCYP/families have a right to a statutory assessment if they ask but their circumstances indicate that their needs can be met under universal provision/early help?

1. Different legal thresholds apply to different types of statutory assessment. For example:
  - a. For an EHC needs assessment, the question is whether the authority is of the opinion that (a) the child or young person has or may have special educational needs, and (b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan; CFA 2014 s 36(8). It is important to note in this context that the trigger for an EHC needs assessment is the child or young person's special educational needs, not their health or care needs.
  - b. The Children Act 1989 has no express assessment duty. However the House of Lords in *R (G) v Barnet LBC* [2003] UKHL 57 held that there is a duty to assess children 'in need', which includes all 'disabled' children. However the form of the assessment is a matter for the local authority, subject to guidance from the Secretary of State, currently in *Working Together 2015* – see the discussion above.
  - c. As noted directly above, a child's needs assessment for transition to adult social care must be carried out (subject to consent) if the child is 'likely to have needs for care and support after becoming 18'.
4. The question suggests that it may be possible to avoid a duty to assess because of an indication that the child's needs can be met under universal provision or through 'early help'. It is very unlikely that the Court would accept that a local authority could refuse to carry out any kind of assessment at all for a disabled child. However in the *Warwickshire* case the Judge approved a policy which provided for 'early help' assessments to be carried out for disabled children with lower levels of need. Whatever form of assessment is used, it must be capable of:
  - a. Answering the question of whether it is necessary to meet the child's needs to provide services under the CSDPA; and
  - b. Link to the duty to carry out a 'parent carer's needs assessment' in section 17ZD of the Children Act 1989, inserted by section 97 CFA.
3. Again, more advice on social care assessments for disabled children after the *Warwickshire* judgment is available through the relevant CDC case law briefing<sup>16</sup>.

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<sup>16</sup> Available at [http://www.councilfordisabledchildren.org.uk/media/1083672/case-law-update-4\\_warwickshire-assessment\\_dec-15.pdf](http://www.councilfordisabledchildren.org.uk/media/1083672/case-law-update-4_warwickshire-assessment_dec-15.pdf)



## About the Council for Disabled Children

The Council for Disabled Children (CDC) is the umbrella body for the disabled children's sector in England, with links to the other UK nations. CDC works to influence national policy that impacts upon disabled children and children with Special Educational Needs (SEN) and their families. The CDC Council is made up of a variety of professional, voluntary and statutory organisations, including disabled young people and parent representatives. CDC's broad based membership and extensive networks of contacts provides a unique overview of current issues. It also enables us to promote collaborative and partnership working among organisations.

CDC hosts the following networks and projects:

- IASS Network
- Independent Support
- Making Ourselves Heard
- Special Educational Consortium
- Transition Information Network



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