

CDC case law update 13 – September 2016

This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

Devon CC v OH (SEN) [2016] UKUT 0292 (AAC)

Case overview

The Upper Tribunal ('UT') allowed an appeal by a local authority against a decision of the First-tier Tribunal ('FTT') in relation to a college placement for O, a young woman aged 19. The UT held that the FTT had erred in naming the independent provision sought by the family. The UT gave guidance on the proper approach to section 19(d) of the Children and Families Act 2014 and the requirement for regard to the 'best possible educational and other outcomes' for children and young people. It emphasised that the test remains whether the provision put forward by the local authority is 'appropriate' for the child or young person.

Decision

The UT heard an appeal by a local authority against a decision of the FTT in relation to the college placement for O, a 19 year old young woman with severe learning difficulties and a number of related needs. The local authority had named a local FE college, P College, in O's EHC Plan. However the FTT ordered that F Centre, an independent specialist college, should instead be named.

O had a specific interest in horses, an issue with the UT held lay at the heart of the dispute. P College offered a programme which involved some work with horses but had no horses on site. The F Centre offered a course of 'Further Education through Horsemastership', an accredited NVQ. The local authority accepted that the F Centre could meet O's needs but considered that a placement there would be an inefficient use of resources, because O's needs could be met at P College. The UT recorded that the additional cost of the F Centre was around £30,000 per annum. The FTT held that P College was not an appropriate placement for O and so did not need to conduct a balancing exercise or consider costs in more detail before naming the F Centre.

Because the F Centre had been approved by the Secretary of State under section 41 of the Children and Families Act 2014 ('the 2014 Act'), the local authority was obliged by section 39(3) of the 2014 Act to name it in O's EHC Plan unless the exceptions in section 39(4) applied. The local

authority argued that naming the F Centre would be incompatible with the efficient use of resources under sub-section 4(b)(ii). It therefore had to name an institution which it considered would be 'appropriate' for O, being P College. The issue for the FTT was therefore the 'appropriateness' of P College.

The UT held that previous authorities under the Education Act 1996 continued to apply, such that the question in relation to 'appropriateness' was what O reasonably required.

The UT then gave guidance on the approach to section 19(d) of the 2014 Act, which requires local authorities (and the FTT) to have regard to the need to help children and young people achieve 'the best possible educational and other outcomes'. By requiring regard to specified matters 'in particular' section 19 required those matters to be considered 'with some thoroughness'. However considering the wording of the legislation, the UT held that "Achiev[ing] the best possible educational and other outcomes" is thus not a duty which the section imposes directly on the local authority nor even directly forms a mandatory consideration.'

The UT reiterated that the 'aspirations' and 'outcomes' sections of an EHC Plan are not appealable, the only appeal right being in relation to 'the special educational needs, special educational provision and the school or other institution'.

The UT held that the FTT had used the Code of Practice to undermine the exclusion from justiciability of aspirations and outcomes – in other words that it had gone beyond the question of the special educational provision reasonably required for O. It had also failed to give sufficient reasons for its decision and failed to apply section 77(6) of the 2014 Act correctly in relation to the requirement to have regard to the Code.

Although the FTT was entitled to consider what the 'best possible education and other outcomes' might be for O under section 19(d), it was not clear that the FTT then went on to apply the test of appropriateness.

The FTT erred in considering the financial benefit to O of education at the F Centre, as the relevant 'resources' are those of the local authority.

Finally, the FTT overlooked material evidence in deciding that the provision at P College was not suitable for O.

What this means for children, young people and families

This decision makes clear that nothing in the 2014 Act, including section 19(d), changes the need to consider whether a placement is 'appropriate'

for a child or young person. This in turn involves consideration of whether it can offer the provision that is 'reasonably required'.

At Tribunal, parents and young people will therefore continue to need to show that the provision being put forward by the local authority cannot meet the child or young person's needs in order to avoid getting into a balancing exercise in terms of relative placement cost.

Parents and young people can however rely on section 19(d) to ask local authorities and the Tribunal to consider what the 'best possible educational and other outcomes' might be, in order to inform the decision as to whether the proposed placement is 'appropriate'.

Implications for local authorities and other public bodies

The 2014 Act (as interpreted by the UT) does not require local authorities to ensure that children and young people achieve 'the best possible educational and other outcomes'. The focus remains on whether placements are 'appropriate' for children and young people, in that they meet their reasonable requirements. However local authorities will want to ensure that they have considered the best possible outcomes for the child or young person in reaching the decision as to which placement is appropriate for them.