

CDC case law update – January 2019



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.

RB v Calderdale MBC [2018] UKUT 390 (AAC)

The Upper Tribunal reversed a decision of the First-tier Tribunal and ordered a local authority to carry out an EHC needs assessment for teenage boy with significant health problems resulting in a relevant 'disability'. The Upper Tribunal emphasised that the key question at the assessment stage was only whether it may be necessary for special educational provision to be made in accordance with an EHC Plan.

Case overview

In this appeal the Upper Tribunal ('UT') was asked to consider a decision of the First-tier Tribunal ('FTT') dismissing an appeal against a local authority's decision to refuse to carry out an EHC needs assessment for a teenage boy with significant health problems.

In the introduction to the decision, the UT Judge emphasised that where a child or young person has a disability or learning difficulty, the test at the assessment stage is whether it may be necessary for special educational provision to be made [in accordance with an EHC Plan], not whether it is necessary for such provision to be made. The UT emphasised that at this stage 'one only needs a provisional rather than a definitive answer to the question of necessity'.

The boy who was the subject of the appeal had a diagnosis of indeterminate colitis, which caused him to miss a significant amount of schooling. The local authority refused to carry out an EHC needs assessment, on the basis that his needs were medically related and could be supported at school under a health care plan.

The FTT upheld the local authority's decision. The FTT found that the boy did have a 'disability' but did not consider that his condition called for special educational provision to be made. In particular the FTT held that provision such as a laptop and home tuition for a child who was too unwell to attend school was not different to the provision generally available to other children at mainstream school.

The UT held that the FTT was required to ask two questions. Firstly, did the boy have a learning difficulty or disability? The answer to this was plainly 'yes'. The FTT did indeed find that the boy had a 'disability'.

The second question was 'predictive'; 'is that disability (or learning difficulty) one that 'calls for' special educational provision or for which such provision 'may be necessary'? This was where the FTT erred in law. The FTT elided the question of whether it may be necessary for special educational provision to be made in

accordance with an EHC Plan with the separate issue of whether it is necessary for such provision to be made in accordance with an EHC Plan, this being the test for a plan to be issued. The UT held that ‘the Tribunal had moved on to consider whether special educational provision was (rather than may be) necessary...without having the necessary evidence (following an assessment) to do so’.

The FTT also erred in focusing on whether the boy had a learning difficulty and not focusing sufficiently on the impact of his disability. The UT held that the FTT ‘missed the point that the interventions R required to enable him to return to (and remain at) school...delivered “otherwise than at school”, “might” have fallen within the definition of special educational provision.’ The UT further held there was a ‘world of difference’ between the type of support the boy needed and the kind of ‘catch up’ assistance provided to a child who missed a few day’s school through ill health.

What this means for children, young people and families

This decision reinforces the fact that the threshold for an EHC needs assessment to be required is relatively low. Once a learning difficulty or disability has been established, the only question is whether it may be necessary for special educational provision to be made in accordance with an EHC Plan. Parents and young people should therefore consider carefully whether to appeal any negative decision in response to a request for an EHC needs assessment, bearing in mind that in general there is a high success rate in such appeals, reflecting this low legal threshold.

Implications for local authorities and other public bodies

Local authorities will be reminded by this decision of the need to apply the correct statutory test at the different stages of the EHC process. The test for issuing an EHC Plan is that it is necessary for special educational provision to be made in accordance with a plan, but the threshold for assessment is much lower – simply that it may be necessary for special educational provision to be made in accordance with an EHC Plan. Given this low threshold, local authorities ought to only refuse requests for EHC needs assessment when it is already clear without carrying out an assessment that it will not be necessary for a plan to be issued. Local authorities should also bear in mind the success rate of FTT appeals against refusal to assess decisions when deciding whether to refuse to assess in any particular case.