

CDC case law update 52 – April 2021

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, either for families or public bodies. Where legal issues arise, specialist legal advice should be taken in relation to the particular case.

London Borough of Redbridge v HO [2020] UKUT 323 (AAC)

The Upper Tribunal held that a decision of the First-tier Tribunal regarding the contents of an EHC Plan involved the making of an error of law. The Upper Tribunal therefore set aside the decision and remade it, deleting the amendment made to the EHCP.

Case Overview

This appeal concerned a decision of the First-tier Tribunal ('FTT') regarding the contents of an EHC Plan for a child known as AK, namely the level of specificity to be included in section F of the Plan. The provision in dispute was that AK 'requires extracurricular support for one hour a week at home from a trusted and familiar psychologist'. AK has ADHD and ASD. He attends a mainstream secondary school ('the Academy'). He had been excluded from his primary school on several occasions for fighting. This led his mother to pay for weekly sessions with a psychologist specialising in ASD, ADHD and challenging behaviour.

The Upper Tribunal ('UT') stated that the 'devil resides in the level of detail that the plan must contain'. It emphasised that an EHC Plan is an unusual type of legal document. It must have sufficient certainty to be enforced in case of dispute, but it is also a living document for a developing pupil. There is a resultant tension between the certainty the parties need in order to comply with or enforce their duties and rights, and the need for flexibility for the plan to remain relevant. Courts and tribunals have struggled in finding this balance.

The UT outlined 11 principles, distilled from conflicting cases by West J in *Worcestershire County Council v SE*, regarding the detail to be included in an EHC Plan.

- (i) The test of the required degree of specificity is that laid down by Laws J in *L v Clarke and Somerset*: 'The real question...in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary'.
- (ii) This 'depend[s] on what is appropriate in the particular: so specific, so clear, necessary in the *individual case*, and *very often*' (*BB v Barnet LBC*).
- (iii) The question has 'to be answered not in the abstract, but against the background of the matters in dispute between the parties' (*S v City of*

- Swansea). Lack of particularity may allow less specific provision; a more detailed case may require more detailed provision.
- (iv) It is not an absolute and universal requirement that the support to be given should be specified in terms of hours per week (*L v Clarke and Somerset; E v Rotherham MBC*).
 - (v) The statutory duty cannot extend to requiring a tribunal to specify every last detail of the provision to be made (*E v Newham LBC*).
 - (vi) Failure to specify a level of support after a particular date may lack the required degree of specificity (*E v Rotherham MBC*).
 - (vii) Provision cast in the form of recommendations as opposed to requirements may lack the requisite degree of specificity.
 - (viii) There will be some cases where flexibility should be retained. The degree of flexibility which is appropriate in any particular case is essentially a matter for the tribunal, taking into account all relevant factors.
 - (ix) It is important that the plan should not be counterproductive. The plan needs to provide not just for the moment it is made but also for the future. Absolute precision would require a continual process of revision, which could disrupt the professional's ability to provide what the child requires and disrupt the child's progress. EHC Plans must allow professionals sufficient freedom to use their judgment on what to do. A tribunal is entitled to use its expertise to decide on the proper balance between precision and flexibility.
 - (x) The broad general principles laid down in *E v Newham LBC* must be applied to the particular circumstances of each case. The EHC Plan needs to be a realistic and practical document which allows for adjustment as knowledge and experience develop. A wide scope should be left to the expert judgment of the FTT: matters which fall rather uneasily within the framework of a judicial process should not be subject to inappropriately technical standards.
 - (xi) The fact that provision is being made at a special school is a factor to be taken into account and may permit more flexibility than when a mainstream school is involved.

The UT considered that principle (x) above is a good summary of the position reached for deciding 'how much detail is enough' but leaves the question 'when *is* enough enough?' The Judge (Lane J) emphasised that since every case is different, there can be no definitive answer. However, she outlined the following practical considerations that should be borne in mind by tribunals.

- a) The LA's statutory duties. The EHC Plan must give the LA a clear picture of what it is required to provide. This is a primary consideration in assessing whether, when and what details must be specified.
- b) The EHC Plan is a free-standing legal document setting out the LA's duties. That is what the parties are entitled to rely on if a question arises about provision.

- c) None of the cases endorse the wholesale abandonment of detail. While there is a need for some flexibility, this should not be used as an excuse for lack of specificity where detail could reasonably have been provided.
- d) The nature of the provision ordered will often point towards the necessary level of detail. In most cases, the professionals involved set out the types of provision they consider necessary, how often it should occur, and who is to deliver it.
- e) Vague words such as 'support' and 'interventions' are unlikely to be sufficient.
- f) Where a SEN pupil attends a mainstream school, more detail will likely be required than if they were at a special school.
- g) Where the evidence does not enable the Tribunal to set out the detail itself but it would be inappropriate to adjourn, or where the provision will need to be reviewed periodically to ensure that it remains relevant to the pupil's needs, the Tribunal may be pragmatic and set out a method by which the details of a particular type of provision is to be made.
- h) The Tribunal is entitled to use its expertise as a specialist panel.

Applying this to the disputed provision, Lane J concluded that the provision was too vague: it was not possible to tell what the psychologist was to provide during the visits to AK's home. Psychological input covers a vast range of individualised therapies, and the word 'support' is inherently vague. The Judge could not see how the LA would be able to know whether it was fulfilling its obligations. The LA and the UT were 'left in the dark'.

Further, the provision contained selection criteria entirely subjective to the pupil, namely a psychologist who is 'trusted and familiar'. This formula contained obvious uncertainties and gave the LA no oversight or right to objective assessment of the psychologist or the sessions. This vagueness and subjectivity could make compliance by the LA a practical impossibility. The UT therefore concluded that the amendment was made in error of law.

This was sufficient for the UT to allow the appeal, but Lane J also found inadequacies in the FTT's decision which amounted to material errors of law. The 'Conclusions and Reasons' comprised of 12 short paragraphs, four of which were introductory. Three (amounting to three short sentences) repeated the issue and stated a 'stark conclusion' that AK needed home intervention because he had only been at the Academy a short time and had previously been at risk of exclusion. Lane J considered that 'one might ask "so what?"'

Lane J held that the FTT's decision that it was necessary for the provision to be delivered by a psychologist was not a decision that a reasonable Tribunal could have reached on the evidence before them. The evidence of the experts and professionals did not support the Tribunal's finding. There was only one report that recommended a psychologist be engaged. The FTT should have asked itself whether there was a flaw in the basis of this report and whether it could be accepted as reliable in the face of

the body of professional evidence to the contrary. The only reason the FTT gave for rejecting all these reports was that AK had only been at the Academy for a short time. This was 'plainly not a sufficient reason in the circumstances'. The FTT was entitled to exercise its specialist knowledge and experience, but it was 'not entitled to go on a frolic of its own on a ground not supported by any of the evidence'. These inadequacies were also a sufficient error on which to overturn the decision.

This left the question of whether AK required an hour of input from someone at home. Lane J held that there was insufficient evidence to warrant such provision.

What this means for children, young people and families

This case provides some further guidance regarding EHC Plan specificity. The decision, at [21], outlines some practical considerations and factors that should be borne in mind by tribunals when determining how much detail is required.

The decision places greater emphasis than earlier decisions on the importance of providing for flexibility, in order to ensure that the EHCP is a living, practical document for a developing pupil.

In the event of disputes, parents and young people will need to evidence not only what provision their child needs but also that the level of detail sought within the EHC Plan is necessary.

Implications for local authorities and other public bodies

The decision emphasises that the degree of specificity required in section F of an EHC Plan depends on the circumstances of each case – although the wholesale abandonment of detail is never permitted. There is an emphasis on flexibility, although the UT underlined that this should not be used as an excuse for lack of detail where it could reasonably be provided.

The eight practical considerations outlined at [21] will be useful to local authorities when drafting EHC Plans. In particular words such as 'support' and 'interventions' are unlikely to be sufficient. More detail will likely be required where a pupil attends a mainstream school. A primary consideration is ensuring that the EHCP gives the LA a clear understanding of what it is required to provide.