

CDC case law update 46 – December 2020



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.

Kumar v London Borough of Hillingdon [2020] EWHC 3326 (Admin)

The High Court held that parents in dispute with a local authority over an EHCP were entitled to bring a lawyer to a mediation, and this did not require the consent of the local authority or independent mediator.

Case overview

This case concerned whether a parent is entitled to bring a lawyer to a mediation with a local authority. Ms Kumar was in dispute with Hillingdon London Borough regarding her son's EHCP. Ms Kumar pursued mediation and wanted her lawyer to attend but was told that Hillingdon would not attend a mediation with her lawyer present.

The Children and Families Act 2014 ("the Act") provides, in section 52, for a right to mediation. Where a parent invokes that right, the local authority must arrange for, and participate in, mediation, as provided by section 54(2). Regulation 38(1) of the SEND Regulations 2014 sets out who may attend a mediation. This includes the parties to the mediation, 'any advocate or other supporter that the child's parent or the young person wishes to attend the mediation', and any other person, with the consent of all the parties to the mediation or, failing that, the consent of the mediator.

The issue in this case was whether a parent is entitled to bring a lawyer to mediation or whether this requires the consent of the local authority (or the mediator). This was said to depend on whether 'any advocate' in Regulation 38(1)(b) includes a lawyer.

'Advocate' is not defined in the statutory scheme. Hillingdon argued that 'advocate' had different meanings in different contexts. First, they argued that 'advocacy and support' had a special usage in the scheme of the Act. They pointed to local authorities' obligations to provide advocacy and support services to children, which are met by deploying trained supporters who are not necessarily legally qualified. Second, they argued that the point of mediation is that it is an informal, non-legalistic settlement process and, therefore, for it to work, it is necessary not to have a lawyer, unless the local authority agrees or the mediator consents. To support this argument, Hillingdon drew on the SEND Code of Practice which states, at paragraph 11.38, that "generally legal representation should not be necessary at the mediation, but this will be a matter for the parties and the mediator to agree".

The High Court rejected Hillingdon's arguments. While the Judge was satisfied that where local authorities have duties to provide advocacy and support

services, they are not under a *duty* to provide a lawyer, this did not mean they had *no power* to do so. In any event, the Judge was not persuaded that looking at a local authority's duty to provide advocacy services was helpful in deciding who a parent may bring to mediation. The High Court emphasised that the Act creates a legal right to mediation and a legal duty on the part of a local authority to arrange, and participate in, mediation. The Judge reasoned that the power (in section 56 of the Act) to make Regulations places some practical limitations on these rights and duties but there are limits on how far it can do so.

The Judge stressed that the whole scheme of the Act is to support and protect the interests of families and children with special needs. Local authorities are under general duties in the exercise of their functions to have particular regard to the views and wishes of parents, the importance of families participating in decisions, and supporting families to help the child achieve the best possible outcomes. Local authorities have huge powers over the lives of families, making decisions with potentially lifelong consequences. The Judge highlighted the inequality of power when parents are unhappy with these decisions (referring to a 'fundamental and frightening inequality of power') and recognised that 'disputing with a local authority is daunting for the most confident and best-equipped parent'.

This led the High Court to hold that the right of a family to bring a supporter with them is key to the exercise of the right to mediation itself. No exception is expressly placed on this right, and the Judge stated that a court should be slow to read one in. It did not matter who the parent brings as a supporter: they can bring anyone they choose, including a lawyer. Whom the parent brings 'is none of the local authority's business'. The only limitation is that there is a right to *one* supporter.

The Judge was unconvinced that paragraph 11.38 of the Code of Practice suggested anything else. This paragraph was about making mediation work well and was not capable of seeking to limit the Regulation.

The Judge held that 'The real question...is whether there is legal authority...for a local authority to control whom a parent wishes to bring with them to an EHCP mediation for support, and to refuse to arrange for or participate in mediation if it does not approve of that person, on the grounds that they are a lawyer or for any other reason. The answer is no.'

The High Court therefore held that, in refusing to accommodate Ms Kumar's choice of supporter, and to arrange and participate in mediation, Hillingdon was in breach of its statutory duties.

What this means for children, young people and families

This case will reassure parents that they are entitled to bring whoever they like to a mediation with a local authority, including a lawyer. The judgment recognises the importance of a supporter being present at mediation, so that the parent is not alone and that they have someone there of their choosing.

The judgment emphasises that the statutory scheme is about supporting families and children who have significant needs in contexts in which they are vulnerable and at a disadvantage compared with public bodies.

Implications for local authorities and other public bodies

This decision clarifies that the SEND Regulations 2014 do not permit local authorities to control who a parent brings to mediation for support. Where a parent invokes their right to mediation, local authorities' statutory obligations require them to arrange, and participate in, mediation and to accommodate the parent's choice of supporter, which can include a lawyer.

The judgment recognises that the process of mediation needs to be manageable and workable. In this regard, the Regulations provide for the practical restriction that there is a right to only *one* supporter. However the Judge went on to observe that 'where the consent of a local authority to additional attendance at mediation...is required, that is a discretion which must in any event be exercised properly on a public law basis, taking particular account of the matters set out in section 19 of the Act, including the wishes of parents'

Local authorities will need to be mindful of the Judge's observation that 'Although the Act makes local authorities an important part of the solution to the needs of families with vulnerable children, it requires them to be mindful of the inevitable risk that they become, or are seen to become, part of the problem.'