

CDC case law update 10 – June 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.

Staffordshire County Council v JM [2016] UKUT 0246 (AAC)

Case overview

This Upper Tribunal decision confirms that school transport is not either a special educational need or special educational provision. As such the Tribunal has no jurisdiction to order a local authority to provide school transport. The legal remedy in school transport cases is judicial review.

The Upper Tribunal also held that the duty to provide transport to adult learners only arises if the local authority considers it to be necessary in all the circumstances to fund such transport.

Decision

The dispute in this case arose because the local authority held that it only had to pay for transport for H (a young person aged 21) to her college if they considered it to be necessary. H's family refused to provide the information requested to help the local authority reach this decision on the basis that the request was unnecessary and intrusive.

The First-tier Tribunal ('the Tribunal') had held that H required a carefully graded programme at her college, that provision of that programme required provision of transport to access it and that this amounted to a form of provision for H's special educational needs. As such it ordered the local authority to provide transport for H.

The Upper Tribunal disagreed. Having considered a number of authorities decided under the previous legislation, the Upper Tribunal Judge held that 'it cannot sensibly be argued that a need for home to school transport arises from a "learning difficulty"', this being a requirement of the definition of a special educational need. Nor could home to school transport be classified as a form of special educational provision. The Upper Tribunal held that 'special educational provision is distinct from the transport needed to access that provision'.

As such the Tribunal lacked jurisdiction to consider transport issues in the appeal or to make any orders requiring transport to be provided. This is because the Tribunal's jurisdiction is limited to matters concerning special

educational needs and provision, as well as the child or young person's placement. The Tribunal also lacks any powers to make orders dealing with any other matters, including transport.

In cases where choice of school or college is in issue, the cost of transport is a matter which the Tribunal may have to take into account in deciding which provision to order. However this was not such a case.

Furthermore local authorities only have a duty to make transport arrangements for adult learners where they consider the arrangements to be necessary in all the circumstances – see section 508F of the Education Act 1996. Although the question of what is 'necessary' is a matter for the local authority, 'in deciding that question they must exercise their judgment judiciously and in good faith. If they come to the conclusion that it is necessary, they must make the necessary arrangements and the transportation must be free of charge.'

The Upper Tribunal contrasted the adult transport duty with the more extensive duty owed to 'eligible' children of compulsory school age under section 508B of the Education Act 1996.

As the Tribunal has no jurisdiction over transport issues, 'A person adversely affected by a decision concerning the provision of transport would have to seek a remedy by way of judicial review.'

The SEND Code of Practice at 9.215 must not be interpreted as laying down 'a free-standing rule allowing transport needs to be included in an EHC Plan if exceptional circumstances could be shown to exist.'

Finally, the Upper Tribunal noted that H's EHC Plan was still only in draft form and it was therefore 'not clear that there was anything capable of being appealed', given that the right of appeal only applies where an EHC Plan is finalised or following amendment or replacement of an existing plan. However this point was not addressed by the parties and so the Upper Tribunal reached no decision on it.

What this means for children, young people and families

This decision makes it clear that school transport is not special educational provision. As such the Tribunal will not have jurisdiction to resolve transport disputes. Transport issues must be resolved through the local authority's appeals process and if necessary through judicial review. Expert advice on when judicial review may be appropriate will be needed as soon as possible in every case.

Young people aged over 18 can rely on this decision to highlight that there will be a duty to provide them with free transport to college if their

local authority accepts that this is necessary in all the circumstances. The legislation specifies that the circumstances to be considered in reaching this decision include 'the age of the adult and the nature of the route'. There is also a discretion for local authorities to pay some or all of the transport costs for adult learners even if they do not accept that the duty arises.

Families need to be careful before refusing to provide information requested by public bodies and may want to take advice before refusing such requests. Refusing to provide information may result in a local authority avoiding a duty to make provision, although this will depend on the facts and circumstances of the case.

The duties in relation to school and college transport are complex and vary depending on the age of the child or young person. Families will need to take advice based on the facts of their case.

Finally, families need to ensure that appeals to the Tribunal are only brought when an appeal right under section 51 of the Children and Families Act 2014 arises. In cases where there is no Tribunal appeal right then the remedy for any unlawfulness will be judicial review.

Implications for local authorities and other public bodies

Local authorities will need to ensure that their adult transport policies properly reflect the nature of the adult transport duty, in particular that adult learners will be entitled to free transport if an assessment shows this to be necessary.

Local authorities also need to have effective appeals processes in place given that the Tribunal does not have jurisdiction to consider these disputes. Local authorities without effective transport appeals processes may see an increase in applications for judicial review in this area.

If a Tribunal appeal is lodged asking the Tribunal to make orders in relation to transport issues, the local authority may well be able to rely on this decision to resist this aspect of the appeal. As part of the local authority's information provision duties families should be advised of the existence of alternative remedies, being the local authority's transport appeals process and / or judicial review.