

CDC case law update 14 – 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.

Hertfordshire CC v (1) MC, (2) KC (SEN) [2016] UKUT 0385 (AAC)

Case overview

The Upper Tribunal ('UT') dismissed an appeal by a local authority against a decision of the First-tier Tribunal ('FTT') that an EHC Plan was necessary for a 8 year old boy with high functioning Autistic Spectrum Disorder ('ASD'). In particular, the UT considered the approach to the question of whether it is 'necessary' for an EHC Plan to be issued for a child or young person.

Decision

The appeal concerned J, an 8 year old boy with a diagnosis of high functioning ASD. J had a range of difficulties including serious behavioural problems. He had achieved average and high average levels in maths and writing but a lower level in reading. By the time the appeal reached the UT J had been withdrawn from his previous independent school as he was facing expulsion.

The local authority carried out an EHC needs assessment for J but decided that it was not necessary to issue an EHC Plan for him in the light of this assessment. J's parents appealed and the FTT ordered the local authority to issue a plan.

The UT held that there was no legal error in the FTT's decision. Firstly, the question of whether J had a 'learning difficulty' was not a live issue before the FTT and so could not be pursued on appeal. The UT gave guidance for future cases that there was likely to be an overlap between a learning difficulty and a disability by virtue of the broad definition in the Equality Act 2010. The UT emphasised the need for any disability to prevent or hinder the child from making use of school facilities to come within the definition of 'special educational needs' in section 20 of the Children and Families Act 2014.

Secondly, the FTT gave adequate reasons for the conclusion that an EHC Plan was necessary for J. The local authority's criticism that the FTT focused solely on negative evidence in relation to J's progress was

rejected. The UT held that the FTT had engaged with the evidence on both sides as presented at the hearing.

Thirdly, the FTT had dealt adequately with what could reasonably be provided from the resources normally available to a mainstream school in deciding whether an EHC Plan was necessary for J. The UT reiterated that 'necessary' has 'a spectrum of meanings, somewhere between indispensable and useful'. The UT highlighted the guidance in the Code of Practice, which stresses that if a child is not progressing or not progressing sufficiently well despite appropriate assessment and provision, then it may be necessary for the local authority to make special educational provision in accordance with an EHC Plan. However, the UT also emphasised that there may be situations in which an EHC Plan is necessary for reasons not expressed in the Code of Practice. The UT also stressed that it was not the task of the FTT in an appeal such as this to draft the EHC Plan, merely to decide if a Plan should be issued.

Fourthly, the local authority's argument that an independent school would not have the duty under section 66 of the 2014 Act to use its best endeavours to secure special educational provision did not take matters any further.

What this means for children, young people and families

This decision emphasises that the test for an EHC Plan to be issued is that it is 'necessary', but that the term 'necessary' has a 'spectrum of meanings'. Parents and young people appealing to the FTT will want to show if possible that the test put forward in the Code of Practice is met, being that the required provision could not reasonably be made from within the resources normally available to mainstream schools.

However the UT stressed in this decision that there may be other reasons why an EHC Plan is 'necessary' in a particular case. The UT held that 'what is "necessary" is a matter to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment'.

Implications for local authorities and other public bodies

Local authorities will need to ensure that careful consideration is given to whether an EHC Plan is 'necessary' for a child, focussing on the question of whether the child's needs can reasonably be met from the resources normally available to mainstream schools. However all other reasons why an EHC Plan may be 'necessary' must be fully taken into account.