

CDC case law update 15 – December 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.

East Sussex CC v TW [2016] UKUT 528 (AAC)

The Upper Tribunal gave guidance on the proper approach to Section I of EHC Plans and when social care and health provision becomes ‘deemed’ special educational provision.

Case overview

The Upper Tribunal (‘UT’) allowed an appeal by a local authority against a decision of the First-tier Tribunal (‘FTT’) in relation to an EHC Plan for a young person with a range of needs including autistic spectrum disorder and ADHD. The UT gave important guidance on when social care and health provision becomes educational provision under section 21(5) of the Children and Families Act 2014.

Decision

The young person, T, is registered at a specialist independent day college and lives in a rented flat with domiciliary care.

There were five questions for the FTT:

1. Whether the description of the primary causes of T’s needs should centre on his autism and related anxiety. The FTT decided that it should.
2. Whether T’s back problems were part of his educational needs. The FTT held that they were not.
3. Whether T required a waking day curriculum. The FTT decided that he did.
4. Whether the domiciliary care provided to T at home was educational provision. The FTT held that it was.
5. Whether the package of support at home should be included within Section I of the Plan. The FTT held that it should.

The UT dealt first with the question of the divide between special educational provision and social care provision. The UT highlighted that under section 21(5), social care provision which educates or trains a young person such as T is to be treated as special educational provision, and not as social care provision. The UT referred to this as ‘deemed special educational provision’.

The UT made clear that deemed special educational provision ‘properly belongs in Section F of the plan and not in Section D¹’ and emphasised that ‘the local authority

¹ This reference to Section D would seem to be an error, as section D must contain ‘The child or young person’s social care needs which are related to their SEN or to a disability.’ Any social care provision falls within section H1 or H2 of an EHC Plan, see the SEND Code of Practice at p161-162 and regulation 12 of the SEN and Disability Regulations 2014.

must secure the provision under section 42(2)' (of the Children and Families Act 2014). The UT highlighted that where a local authority had not correctly identified deemed special educational provision, the FTT must move it to Section F. The UT highlighted that the FTT has no power to change in any way provision which properly remains social care provision.

On the waking day curriculum issue, the UT held that this term 'means only that the person's special educational needs are such that they call for special educational provision to be delivered beyond 'normal hours''.

On the question of Section I of T's plan, the UT held that the FTT had erred in including domiciliary care at home as this did not constitute an institution 'to be attended by' T, as the regulations require. The UT held that T's home could not be an 'institution' within the meaning in the regulations. This has obvious implications for home programmes of education, as discussed below.

The UT also gave guidance on the degree of specificity necessary in an EHC Plan. The UT cited the well known case of *L v Clarke and Somerset CC* [1998] ELR 129, stating that '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'. Although the UT accepted that some degree of flexibility may be necessary, it was not prepared to accept as a general proposition that flexibility is permissible when provision is being made at a special school or college, although this is a factor which can be taken into account.

Finally, the UT highlighted that although the FTT had inserted a reference to 'supported living' into Section I of T's EHC Plan, there is no general definition of this term in the legislation.

What this means for children, young people and families

This UT decision emphasises the importance for parents and young people of correctly identifying whether provision which is generally thought of as social care or health provision is in fact special educational provision under section 21(5). The test is simply whether the provision in question educates or trains the child or young person. If it does, then the UT gives clear guidance that it should be set out in Section F of the EHC Plan and provided under the duty in section 42(2). This is an issue for the FTT to resolve for itself in the event of an appeal by the parent or young person.

On the thorny issue of a need for a waking day curriculum, parents and young people seeking residential placements need to be aware that the need for such a curriculum does not necessarily justify residential provision. It may be necessary to show on the facts of a particular case why even an extended day cannot be provided without overnight accommodation. Equally it may simply be impracticable for a child or young person to attend a particular setting otherwise than on a residential basis, and if that is the only setting which can appropriately meet the child or young person's needs then it ought to be funded by the local authority.

The decision has led to real concerns about the approach to the inclusion of home programmes within EHC Plans. It is very difficult to see how a home programme can now be included within Section I, as the child's home is not an 'institution' which can 'be attended'. It may be that the only alternative is to include the provision to be made under a home programme within Section F of a Plan, relying on section 61 of the 2014 Act for the power for this provision to be made at home. There would however need to be clear agreement as to precisely which provision in Section F of a Plan will be made at home to protect the child and family's position.

Parents and young people will no doubt welcome the clear reminder in the UT's judgment of the importance of specificity in EHC Plans, so that there is 'no room for doubt' as to what needs to be provided.

Implications for local authorities and other public bodies

Local authorities will need to ensure that careful consideration is given in every case to whether social care provision is in fact deemed special educational provision and should appear in Section F of the plan. Similarly, local authorities will need to work with their health partners to ensure that any health provision which is deemed special educational provision is moved to Section F of the plan. The responsibility to arrange deemed special educational provision rests with the local authority (see SEND Code of Practice at para 9.76), whether or not this provision would normally be seen as social care or health provision.

Local authorities will also need to heed the UT's guidance on the waking day curriculum issue and the need for specificity, as set out above. The decision also has guidance on how to draft Section I for young people, particularly the need to specify a type of 'institution' (if appropriate) and the requirement not to include terms such as 'supported living' without proper definition of their meaning.

Local authorities will have to work with the families (and potentially the First-tier Tribunal) to resolve how to include home programmes within Plans otherwise than in Section I, unless a way can be found to distinguish this decision. As suggested above it may be that this can be achieved through Section F.