

CDC case law update 17 – July 2017

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.

ME v London Borough of Southwark [2017] UKUT 0073 (AAC)

The Upper Tribunal clarified the rights of parents to have a mainstream school named in their child's EHC plans and the limited grounds on which this choice can be overruled.

Case overview

The Upper Tribunal ('UT') allowed an appeal by the parents against a decision of the First-tier Tribunal ('FTT') in relation to an EHC Plan for a child with autism who was transferring to secondary education. The FTT had dismissed an appeal by the parents against a decision by the local authority to name a special school in the EHC plan. Having clarified the law, the UT ordered the case to be reheard by a different FTT panel.

Decision

The dispute in this appeal centred on whether the child, O, should attend a mainstream school (as requested by his parents) or a special school (as determined by the local authority).

The UT considered the relationship between sections 33 and 39 of the Children and Families Act 2014, which impose qualified duties requiring a child's plan to name a school or identify a type of school. The UT emphasised that section 39 should be considered first. This requires local authorities to name the school chosen by the parents unless the school is unsuitable for the child and/or his attendance would be incompatible with the efficient education of others or the efficient use of resources (see section 39(4)).

If the local authority does not have to agree to the parents' request under section 39 because either or both the section 39(4) exceptions apply, then it must name a school or type of school which is appropriate for the child (section 39(5)). This then brings into play section 33, which provides that children must be educated in mainstream schools unless this is incompatible with the parents' wishes or with the efficient education of others. Under section 33, the local authority is only allowed to decide that mainstream placement would be incompatible with the efficient education

of others if there are no reasonable steps which could be taken to prevent this.

The UT emphasised that although 'incompatible' in both section 39 and 33 is a strong term, the impact must be on the 'efficient education' of children – the question being whether the impact of the child's attendance would be 'so great as to be incompatible with the provision of efficient education'. The term 'efficient education' means 'not the very highest desirable standard or the very basic minimum, but something in between'.

The UT held that the FTT had erred in numerous respects in its decision. It had failed to provide sufficient reasons for its decision and failed to show how it dealt with the necessary steps of the analysis under sections 39 and 33. It had also failed to take account of the duty to specify, and make provision for meeting, O's special educational needs in reaching its decision on placement.

What this means for children, young people and families

This UT decision emphasises that parents and young people have a right to (i) a placement in a specific school or institution and (ii) mainstream education unless one of the limited number of exceptions applies. Parents and young people can also be reassured that if local authorities want to rely on the exceptions in relation to incompatibility with efficient education of others, they will need to show a significant impact on the quality of education generally if the child or young person were to attend the school or institution which could not be reasonably avoided.

Implications for local authorities and other public bodies

Local authorities who wish to resist requests for placement in a particular school or institution will need to ensure that the evidence supports a decision that one of the exceptions in section 39(4) applies. Particular care will continue to be needed if it is argued that the child or young person's attendance would be incompatible with the provision of efficient education for others.

Local authorities will also need to ensure that the legislation is applied in the correct order – considering first whether they are required to accept the parent or young person's request for a particular school or institution under section 39, and only if this decision is negative turning to whether a mainstream school or institution should be named in the plan under section 33.